not actually exist, but which is ascribed to the parties by operation of law'[42]. The English position is again very difficult.[43]

Previous authorities in this area seemed to require that (as in *Hohol v. Hohol*) the plaintiff incur some detriment or prejudice, such as making financial or other contributions to the property or leaving one pleasant place for a less pleasant place in order to establish a constructive trust. Once however, it is decided that the trust is a form of express trust, detriment or prejudice strictly speaking is irrelevant. In other circumstances where it is sought to overcome the Statute of Frauds, in the case of unconscionable conduct for example, there may be cases where such detriment or prejudice is relevant.[44] Nonetheless, in the case of an express trust which is enforceable in the absence of writing by virtue of the principle applied in *Organ v. Sandwell*, the facts which may have given rise to 'detriment' may support a finding that valuable consideration, which is necessary, may have flowed from the plaintiff to the defendant.

Several general comments may finally be made in respect of *Thwaites v. Ryan*. In the first place, there is no doubt that the decision is surprising in many respects and that the law in this area of the law of trusts in Australia may now be regarded as very confused, bearing in mind the substantial conflicts that now exist between the Full Courts of the Supreme Courts of Victoria and New South Wales and the various differences that further exist between their decisions and recent English decisions. Matters are so confused that probably only the High Court may resolve them. In the second place, there is little doubt that the decided cases in this area are very difficult to reconcile with equitable principles and it is desirable that some limitation be placed on the application of these cases. This is particularly so in regard to the English decisions and it is hence understandable that Fullagar J. should seek to confine them, as it were, to their own facts and in this sense the decision in *Thwaites v. Ryan* is perhaps to be justified on grounds of general policy.

D.M. MACLEAN*

CHURCH OF THE NEW FAITH v. COMMISSIONER FOR PAY-ROLL TAX[1]

Pay-roll Tax (Vic.) — Scientology, whether exempt — Meaning of religion.

In spite of the findings made by Crockett J. in the first instance and on appeal by the Full Court of the Supreme Court of Victoria (the subject of an earlier case note by the author)[2], the Church of the New Faith made an application to the High Court of Australia for special leave to appeal against the lower courts' decision. The resultant unanimous decision by the High Court both to grant special leave and to exempt the scientologists from the pay-roll tax assessment earlier made by the Commissioner for Pay-roll Tax has provided most liberal guidelines as to what will constitute a religious organization in this country. The factual situation allowed the High Court to address itself to an area in which there were very few pre-existing major Australian decisions. The purpose of this case note is to examine the three approaches adopted by the various judges under circumstances where their Honours had considerable room to exercise judicial creativity in shaping the law in this area.

1. *MASON A.C.J. AND BRENNAN J.*

Their Honours commenced with a brief recapitulation of the facts and by acknowledging that the question before them amounted simply to whether Scientology was a religion. Although they proceeded to consider this question, they made the valid observation that a determination of this question one way or the other would not necessarily furnish an answer to the question as to whether the applicant

[42] [1977] 2 N.S.W.L.R. 685, 694.

[43] See the discussion of the various authorities in *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685, at 693-5, 699-701. From a practical point of view it will be difficult to distinguish between cases where an intention is evidenced by 'expressive conduct' and where it is 'imputed' or 'ascribed' to the parties by operation of law.

[44] See Spry, *loc. cit.* 236-9.

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[1] (1984) 57 A.L.J.R. 785 (before Mason A.C.J., Murphy, Wilson, Brennan and Deane JJ.)

[2] (1983) 14 M.U.L.R. 318-25. The facts are set out in some detail in this earlier note.

corporation was a 'religious institution' for the purposes of section 10(b) of the Pay-roll Tax Act 1971.[3] The danger in considering solely whether Scientology was a religion was that important features of the character of the applicant itself would be glossed over or ignored.

Their Honours had a vast amount of evidence before them, including almost a complete library of writings by L.R. Hubbard (which had been tendered before the Supreme Court). They decided to restrict their consideration to those matters which had been elucidated by affidavit or by oral evidence for the simple reason that the:

> . . . court cannot be assured that the meaning of writings said to be of religious significance is the meaning which the ordinary reader would attribute to them.[4]

To this end their Honours concluded that the question 'Is Scientology a religion?' could not be answered by them as they did not have all of the necessary tenets of Scientology before them for examination. Rather, the central inquiry had to be whether the beliefs and observances which were actually established by oral and affidavit evidence as those of the Scientologists could properly be described as a religion.

The question of whether special leave to appeal should be granted received an affirmative response on two grounds: firstly the lack of Australian authority and secondly the importance of the concept of religion to a free society which expected to be able to exercise a degree of religious freedom without legal restraint or intervention. Precisely because there had been such divergence of approach by their Honours in the Victorian Full Court it was felt to be necessary for the High Court to provide 'an authoritative Australian exposition of the concept of religion'[5]. In providing such an authoritative Australian decision the Court would have an opportunity to review the available American and British decisions and decide whether the Australian concept of religion should be confined to theistic systems of belief.

The problem with judicially defining religion for legal purposes is that no form of majority view or reasonable man test can be used as the guideline. Where a constitutional guarantee such as that provided by section 116 is concerned it is of particular concern to provide protection for the adherents of minority religions. The fundamental liberty which is at stake is the freedom of religion for all and beyond protecting that right the law does not seek to provide protection for the tenets of any particular religion. Indeed as their Honours observed:

> . . . no such protection can be given by the law, and it would be contradictory of the law to protect at once the tenets of different religions which are incompatible with one another . . .[6]

The key to the approach adopted by the Acting Chief Justice and Mr Justice Brennan seems to lie in the idea that the ambit of the religious freedom guaranteed by our Constitution should not be permitted to be constrained by taking a narrow view of religious institutions in the context of fiscal legislation. While clearly complete subjectivity is not acceptable[7] their Honours faced the same difficulty that all previous judicial analyses in this area have faced, namely just what objective criteria should be adopted in this field.

The first problem is the simple one of defining the range of acknowledged religions from which the supposedly objective criteria can be drawn. Their Honours endorsed the view of Latham C.J. in the *Jehovah's Witnesses* case[8] that it is impossible to frame a definition of religion that will satisfy everybody and then alluded to various works of scholarship in the field of comparative religion which highlight the difficulties.[9] The conclusion reached was that it was unnecessary to try and canvass all religions known to mankind in drawing up criteria, but rather to enquire into and arrive at a workable legal policy to apply in the area.

[3] (1984) 57 A.L.J.R. 785, 786.
[4] *Ibid.*
[5] *Ibid.* 787.
[6] *Ibid.*
[7] 'The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call them a religion'. *Ibid.* 788.
[8] *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 C.L.R. 116, 123.
[9] Professor Arnold Toynbee's *An Historian's Approach to Religion* and Sir James Frazer's *The Golden Bough*.

The role which the State is to play by way of superimposing a legal framework on the entire range of conduct permitted by any one code of religious belief was the second underlying problem to be considered. Their Honours concluded that the basic substance of religious belief was a belief in the supernatural which transcended ordinary reason and cited [10] the *obiter dicta* of Judge Learned Hand in *United States v. Kauten* [11] in support of this proposition. The role which the State could play in monitoring what constituted religious belief was clearly limited because:

> . . . the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth . . .[12]

The concept of religion is taken to be one which encompasses not only religious belief but a code of conduct which is defined by and in turn helps to define the relationship between the human adherents and the supernatural. A code of conduct which was dictated by religious belief would be *prima facie* subject to the legal protection accorded by the principle of freedom of religion, but the immunity would have clearly defined limits. As their Honours explained:

> . . . the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them . . . Religious conviction is not a solvent of legal obligation . . .[13]

Important examples were cited of where the courts have prevented certain conduct of religious groups which brings them into conflict with the general law of the community. These included the U.S. Supreme Court decision disallowing the practice of polygamy by the Mormons [14] and the Australian High Court's refusal to allow the pacifist principles of the Jehovah's Witnesses to excuse their attempts to subvert the war effort during World War II.[15]

The test arrived at by their Honours stands as follows:

> We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle, and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individuals or a group's freedom to profess and exercise the religion of his, or their, choice.[16]

This test was expressly stated to depart from the test of Adams J. in *Malnak v. Yogi* [17] and the test of Dillon J. in *South Place Ethical Society: Barralet v. Attorney-General* [18]. The former test was rejected as being too wide because it included not only non-theistic systems of belief but also those which did not comprise any supernatural element. The latter test was rejected as being too narrow because it limited religions purely to theistic religions. Their Honours commented on the English decision:

> . . . To restrict the definition of religion to theistic religions is to exclude Theravada Buddhism, an acknowledged religion, and perhaps other acknowledged religions. It is too narrow a test. We would hold the test of religious belief to be satisfied by belief in supernatural Things or Principle and not to be limited to belief in God or in a supernatural Being otherwise described . . .[19]

[10] (1984) 57 A.L.J.R. 785, 788.
[11] (1943) 133 F. 2d. 703, 708.
[12] (1984) 57 A.L.J.R. 785, 788.
[13] *Ibid.* 789.
[14] *Reynolds v. United States* (1878) 98 U.S. 145.
[15] The *Jehovah's Witnesses* case *(supra)*.
[16] (1984) 57 A.L.J.R. 785, 789.
[17] (1979) 592 F. 2d. 197.
[18] [1980] 1 W.L.R. 1565.
[19] (1984) 57 A.L.J.R. 785, 791.

Having set down the test to be applied, consideration was then given to the decision of Crockett J. in the first instance. Their Honours found that the fundamental problem with the trial judge's approach was that he had approached the question of whether Scientology was a religion by considering the beliefs, practices and observances of the people in command rather than those of the general body of adherents to Scientology. They rejected the trial judge's view that the gullibility of the adherents could not make a religion out of Scientology. In reaching the opposite conclusion their Honours commented:

> . . . Yet charlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.[20]

It was because Crockett J. had determined that Scientology's appearance of religion was lacking or *bona fides* and a sham that his Honour had not gone on to examine the relationship between the canons of conduct and the supernatural beliefs held by the general adherents of Scientology. The High Court heard new evidence, including that of the senior spokesman for the Church of Scientology, which probed this relationship between conduct and belief. Their Honours expressed real difficulty in understanding just what the relationship between ethical conduct and belief was in the context of Scientology, not least because L. Ron Hubbard had not articulated the relationship in any of the considerable number of works on Scientology tendered as evidence.[21]

In ultimately finding that the general body of adherents to Scientology had a religion their Honours were prepared to leave aside the motivations of L. Ron Hubbard and the hierarchy of the Church of the New Faith. Their Honours clearly believed that the five or six thousand believers in Scientology in Victoria were quite sincere in their beliefs and that the organization to which they belonged should be given the benefit of any doubt:

> . . . We think an inference should be drawn — though the material to support it is not compelling — that the general group of adherents practise auditing and accept the other practices and observances of Scientology because, in doing what Mr Hubbard bids or advises them to do, they perceive themselves to be giving effect to their supernatural beliefs.[22]

2. *WILSON AND DEANE JJ.*

Their Honours in the other joint judgment of the High Court approached the formulation of their test of a religion in a somewhat different way. Like their brother judges they confined the issue at stake to whether Scientology was properly to be described as a religion but did raise some doubts as to whether this was the sole question which needed to be asked in interpreting s. 10(b) of the Pay-roll Tax Act.[23]

An exhaustive examination of the evidence was carried out, including an analysis of the Constitution of the Church of Scientology, the oral testimony of Mrs Allen and Mr Cockerill (both describing themselves as ministers of the religion), affidavit material and a number of the publications and theories promulgated by L. Ron Hubbard. At no stage was it suggested by either party to the proceedings (in their Honours' interpretation of the evidence) that either of the Scientologists giving oral evidence or the adherents of Scientology generally were lacking in sincerity in their beliefs. Indeed it was not necessary for the Honours to express a view on Crockett J.'s strongly adverse view of the sincerity of L. Ron Hubbard and his assistants because they believed that the case turned upon 'the content and nature of those writings and practices and to the part Scientology plays in the lives of its adherents in Victoria'[24]. The gullibility of the adherents and the motives of the leaders were not important to assessing whether or not the ordinary members belonged to a religious institution.

Wilson and Deane JJ. preferred to attempt their definition of religion by isolating essential characteristics without which you could not say you had a religion. They examined the test of Kaye J. which had required both the recognition of and some kind of personal relationship with a supernatural power or being. They assessed the Kaye J. test in the following terms:

[20] *Ibid.* 791-2.
[21] *Ibid.* 794.
[22] *Ibid.*
[23] *Ibid.* 804.
[24] *Ibid.* 806.

> If . . . it be an essential requirement of a religion that it be centred upon recognition of the existence of a Supreme Being with whom an individual has a personal relationship and upon whom the individual's existence depends, Scientology does not satisfy it. As has been said, the central concern of Scientology is the delivery of the thetan or spirit, which is immortal, from the bondage of the body with little attention being paid to the identification or definition of, let alone any personal relationship with, the Supreme Being. The same can, however, be said of at least two of the immanentis religions or groups of religions which can be traced, directly or indirectly, to India and the Upanishads. Buddhism is, broadly speaking, agnostic about a god while Thereavada Buddhism and Jainism, at least in its original form, actually deny the existence of a personal creator. For that matter, classical Hinduism itself was more concerned with the non-personalized Brahman than with the recognition of, or man's relation with, any one or more of the Hindu Gods . . .[25]

As not only Scientology but a number of major recognized religions would not satisfy this test their Honours rejected it. Indeed they agreed with the comments of Chief Justice Latham in the *Jehovah's Witnesses* case[26] and concluded that there was no single criterion which had to be present or absent before one could say with certainty that you had a religion in Australia. All that one could do was to look to a number of indicia drawn from observations of existing recognized religions and use these as aids in reaching a decision.

Five indicia were isloated by their Honours as being useful in this area:

(i) That the collection of ideas and practices involved a belief in the supernatural (being something that could not be perceived by the senses);
(ii) That 'the ideas relate to man's nature and place in the universe and his relation to things supernatural';
(iii) That the adherents accept certain ideas as requiring them or encouraging them to observe particular codes of conduct or specific practices having some supernatural significance;
(iv) The adherents themselves form an identifiable group or groups;
(v) The adherents themselves see the collection of ideas, beliefs and practices as constituting a religion.[27]

It was conceded that the fifth of these indicia was certainly controversial and that no one or more of the above guidelines would be determinative by itself of the question whether a set of beliefs and practices constituted a religion. It could be said however that:

> . . . It is unlikely that a collection of ideas and/or practices would properly be characterized as a religion if it lacked all or most of them or that, if all were plainly satisfied, what was claimed to be a religion could properly be denied that description . . . the question is approached and determined as one of arid characterization not involving any element of assessment of the utility, the intellectual quality, or the essential truth or worth of the tenets of the claimed religion . . .[28]

Turning to consider the views of religion expounded in recent American decisions, Wilson and Deane JJ. found far greater favour with the decision of Circuit Judge Adams in *Malnak v. Yogi*[29] than their brethren Mason A.C.J. and Brennan J. had done. They recapitulated the three idicia of religion isolated in that case[30] and concluded that Scientology met the first two of those indicia as well as the other five guidelines earlier mentioned in their judgment. Their Honours adopted a somewhat wider and more flexible test than that posed in the other joint judgment of the High Court and that approach left them in no doubt that this was not a 'borderline' case.

While accepting that the practices of Scientology were still subject to compliance with the general laws of the State, their Honours in granting special leave to appeal and upholding that appeal, concluded in the following terms:

> . . . Regardless of whether the members of the applicant are gullible or misled or whether the practices of Scientology are harmful or objectionable, the evidence, in our view, establishes that Scientology must, for relevant purposes, be accepted as a religion in Victoria . . .[31]

[25] *Ibid.*
[26] (1943) 67 C.L.R. 116, 123-6.
[27] (1984) 57 A.L.J.R. 785, 807.
[28] *Ibid.*
[29] (1979) 592 F. 2d. 197.
[30] See (1983) 14 M.U.L.R. 322 for an exposition of these indicia.
[31] (1984) 57 A.L.J.R. 785, 808.

3. *MURPHY J.*

If the test of Mason A.C.J. and Brennan J. can be viewed as being the narrowest of the three tests put forward by the High Court, and the test of Deane and Wilson JJ. (in adopting the American approach to a large degree) the middle ground, then, with respect, the test of Murphy J. is perhaps the widest judicial definition of 'religious body' yet formulated. His Honour set out only to state what was sufficient to allow the categorization of a body as religious in character:

> . . . On this approach, any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural being or beings, whether physical and visible, such as the sun or the stars, or a physical invisible god or spirit, or an abstract god or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine these destinies, and if it claimed to be religious, it would be a religious institution. *Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious.* The Aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed.[32]

The reason for adopting such a very wide test was the idea that in a society which has religious freedom as a fundamental theme the policy of the law must be 'one in, all in'. The role of the law must necessarily be a passive and tolerant one lest a 'religious club' with a monopoly of privileges be created:

> Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status.[33]

Murphy J. considered the origins of religion, the history of scepticism towards religion in this country and then moved on to consider the Church of the New Faith itself. Observing that exemption had already been granted to the Scientologists as religious institution in South Australia, Western Australia, Australian Capital Territory and New South Wales his Honour proceeded to demolish the judgments of the Victorian Supreme Court. One by one the ingredients of religion in the eyes of the Victorian Supreme Court were scrutinized and commented upon.

Firstly a belief in God (which had been considered to be so important by Crockett and Kaye JJ.) was quite unnecessary in his Honour's view. Examples were cited of widely recognized religions without a personal deity: namely Taoism, Thereavadan Buddhism and the Semkhya School of Hinduism.[34] In support of a legal discounting of the need for a personal God, Murphy J. cited the U.S. Supreme Court, Julian Huxley, Albert Einstein and Bertrand Russell.

To the criticisms of Young C.J. that the writings of the Scientologist were 'tautologous', 'obscure' and 'contradictory', his Honour observed that the holy books of many other religions were filled with similar obscurities and mysteries. Thomas Paine had exposed the many contradictions of the Christian Bible, so similar faults in the Scientology texts could not be fatal to the claims of Scientology as a religion. Similarly, just because beliefs were revised over a period of time it did not necessarily mean that the adherents of those beliefs were not genuine.[35] Parallels were drawn between the development of Christian Science and Scientology.

The borrowing of ideas and rituals from earlier religions and the consequential adaptation of ritual to other codes of conduct was considered by Murphy J. not to be 'a mockery of religion', but rather as a perfectly normal part of the evolution of a religious institution.[36] The question of alleged lack of public acceptance of Scientology could not be a determining factor in his Honour's view, for the simple reason that the early stages of the evolution of any religion may be marked by lack of public acceptance. The commercialism of Scientology and its claim to be the one true faith could not on any view be seen to be characteristics of Scientology as distinct from the established religions. In his Honour's view, very few organized religions could be moralistic when it came to commercialism:

[32] *Ibid.* 796 (emphasis added).
[33] *Ibid.* 795.
[34] *Ibid.* 797.
[35] *Ibid.* 798.
[36] *Ibid.* 799.

> The amassing of wealth by organised religions often means that the leaders live richly (sometimes in palaces) even though many of the believers live in poverty. Many religions have been notorious for corrupt trafficking in relics, other sacred objects, and religious offices, as well as for condoning sin even in advance, for money.[37]

On balance, Murphy J. found that the case for granting special leave was 'overwhelming' and the allowing of the appeal essential to prevent the sort of religious descrimination which might ensue if the Victorian Supreme Court approach was endorsed. His Honour's final comment on the Victorian Supreme Court decision was to speculate on how the early Christians would have fared in that forum:

> Christianity claims to have begun with a founder and twelve adherents. It had no written constitution, and no permanent meeting place. It borrowed heavily from the teachings of the Jewish religion, but had no complete and absolute moral code. Its founder exhorted people to love one another and taught by example. Outsiders regarded his teachings, especially about the nature of divinity, as ambigous, obscure and contradictory, as well as blasphemous and illegal. On the criteria used in this case by the Supreme Court of Victoria, early Christianity would not have been considered religious.[38]

4. *CONCLUSION*

We now have a set of judicial pronouncements of the highest authority for Australian courts on what is meant by a religion and a religious institution in this country. It remains to be seen whether the very broad guidelines set by the High Court are in fact manageable or whether the 'charlatanism' considered by Mason A.C.J. and Brennan J. 'to be the necessary price of religious freedom' will be too high a price to pay.

MARK DARIAN-SMITH*

NARICH PTY LTD v. COMMISSIONER OF PAY-ROLL TAX (N.S.W.)[1]

Whether contract for service or of service — express agreement that independent contractor — was relationship that of employer — employee — Payroll Tax Act 1971 (N.S.W.).

In this case, as taken from the headnote[2],

> the appellant held the Australian franchise to conduct Weight Watchers classes for people wishing to lose weight. It engaged lecturers under agreements by which a lecturer agreed to teach the programme detailed in *The Weight Watchers Lecturers' Handbook* to classes arranged by the appellant. The agreements provided a scale of fees, and allowed an engagement to be terminated without notice if the lecturer failed to carry out her duties in a proper manner, or if her weight exceeded her goal weight. Clause 3 stated that 'the lecturer is not an employee of the company but is an independent contractor . . .'. In practice, lecturers deducted their fees from money collected by them for the appellant from the members of each class.
>
> The Commissioner of Pay-roll Tax for New South Wales issued an assessment of tax on amounts of remuneration paid by the appellant to lecturers from 1973 to 1977, on the basis that they were wages 'paid to an employee as such' within s. 3(1) of the Pay-roll Tax Act 1971 (N.S.W.). The appellant's objection [based mainly upon the contention that the lecturers were not 'employees'] was disallowed by the Supreme Court of New South Wales.

On appeal from the decision of Woodward J. to the Judicial Committee of the Privy Council, the Committee advised Her Majesty that the appeal be dismissed. In short, the Committee was of the view that:

(i) 'subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances

[37] *Ibid.* 800.
[38] *Ibid.*
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[1] (1983) 50 A.L.R. 417.
[2] *Ibid.*