

## DOES MORALITY HAVE A PLACE IN APPLICATIONS FOR FAMILY PROVISION BROUGHT PURSUANT TO S 41 OF THE SUCCESSION ACT 1981?

Three judges of the High Court<sup>1</sup> thought not in *Singer v Berghouse*.<sup>2</sup> Eleven years later another three judges of the High Court<sup>3</sup> gave the opposite, affirmative, answer in *Vigolo v Bostin*.<sup>4</sup>

Does this sharp difference in judicial opinion at the highest level signify a danger to judges of lower courts, and practitioners in general, that reliance on such concepts is dangerous and may lead to appealable error; or does the later (majority) judgment constitute a definitive and authoritative statement of the law? The question is of more than academic interest: practitioners have for as long as memory serves given advice and argued cases on the basis of the strength or weakness of the applicant's moral claim on the testator's bounty and the breach or fulfilment of the testator's moral duty. The terms are familiar as are the underlying concepts. Do we now analyse a claim for provision according to these concepts at our peril because a differently constituted High court might see the law in different terms. Two of the judges who constituted the majority in *Vigolo*<sup>5</sup> are no longer on the court.

There are two reasons why I think it is safe to accept the majority view in *Vigolo* as expressing orthodox legal opinion which was reasserted in *Vigolo* against what was, in fact, an aberrant view expressed in *Singer*.

The first is the provenance of family provision legislation, the Testator's Family Maintenance Acts as they were initially called. The second is the overwhelming weight of authority of cases decided by the High Court itself. An examination of these two factors leads, I think, to the conclusion that moral

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<sup>1</sup> Mason CJ, Deane and McHugh JJ.

<sup>2</sup> (1994) 181 CLR 201 at 209.

<sup>3</sup> Gleeson CJ, Callinan and Heydon JJ.

<sup>4</sup> (2005) 221 CLR 191.

<sup>5</sup> Gleeson CJ, Callinan J.

duty and moral claim are concepts fundamental to the meaning and operation of the legislation. They cannot be easily eradicated.

Section 41 provides<sup>6</sup>:

'If any person ... dies ... and in terms of the will ... adequate provision is not made ... for the proper maintenance and support of the deceased person's spouse, child or dependant, the court may, in its discretion, on application by ... the ... spouse, child or dependant, order that such provision as the court thinks fit shall be made out of the estate ... for such spouse, child or dependant.'

The first family provision Act was the New Zealand Testators' Family Maintenance Act 1900. It was replaced by the Family Protection Act 1908. The first occasion in which an appellate court had to consider the legislation was *Re Allardice; Allardice v Allardice*.<sup>7</sup>

Mr Allardice had married twice: both his wives survived him. He had six children by his first wife and seven by his second. He left a very substantial estate entirely to his second family. Five children of his first marriage, all adults, three married daughters and two unmarried sons applied for provision. The trial judge dismissed the application on the basis that none of the applicants was in need: the daughters were supported by their husbands and the sons were self-supporting. They were all capable of earning an adequate living. In a passage which has become famous through frequent quotation Edwards J said:<sup>8</sup>

'It is the duty of the court, so far as possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children ... . If the court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.'

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<sup>6</sup> For brevity and convenience I have omitted reference to intestacy.

<sup>7</sup> (1910) 29 NZLR 959.

<sup>8</sup> At 972-3.

It was this judgment, as I mentioned the first considered opinion on the legislation, which formulated an approach to a determination of applications brought under the Act in terms of moral duty. The court dismissed the appeal by the sons but gave each of the married daughters a small annuity secured on part of the estate set aside for that purpose. An appeal to the Privy Council was dismissed.<sup>9</sup>

The approach was reaffirmed by Salmond J twelve years later in *Re Allen (Deceased), Allen v Manchester*.<sup>10</sup>

‘The Act is ... designed to enforce the moral obligation of a testator to use his testamentary powers for the purpose of making proper and adequate provision ... for the support of his wife and children, having regard to his means, to the means and deserts of the several claimants, and to the relative urgency of the various moral claims upon his bounty. The provision which the court may properly make in default of testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.’

The passage was expressly approved by the Privy Council in *Bosch v Perpetual Trustee Co Ltd*.<sup>11</sup> These cases in particular seem to have embedded the notion of moral duty, moral obligation and moral claim into the law of testators’ family maintenance. As Gleeson CJ pointed out in *Vigolo*:<sup>12</sup>

‘From the earliest days, courts in expounding the legislative purpose have invoked moral values. The reason is not difficult to see. The mischief to which the original legislation was directed was the possibility of unjust exercise of testamentary capacity resulting in inadequate provision for a family member, typically a widow. By hypothesis, the testator had the legal right to dispose of his estate as he thought fit, and the person ... left without adequate provision had no legal right to inherit beyond the extent provided for in the will. The justification for conferring ... a discretionary power to intervene ... when explained in terms of familial obligation, not unnaturally or inappropriately described as moral.’

This early interpolation of morality into the construction of the legislation was not an accident. Its genesis lay in the social forces which impelled the Act

<sup>9</sup> In a two page judgment which did not analyse the legislation or consider any legal principle: [1911] AC 730.

<sup>10</sup> (1922) NZLR 218 at 220-1.

<sup>11</sup> [1938] AC 463 at 479.

<sup>12</sup> 221 CLR 199.

and the terms of the parliamentary debates which brought it forth. That genesis is worth considering.

What follows is taken from a very interesting and informative article by Professor Rosalind Atherton.<sup>13</sup>

The Chief Justice of the New Zealand High Court at the time these early cases were decided was Sir Robert Stout. He wrote concurring judgments and lent the authority of his office to the view of the legislation expressed by Edwards and Salmond JJ. In fact he, and his wife were largely responsible for the new law.

Before his appointment to the Chief Justiceship Sir Robert Stout had been active in politics. He was Premier from 1893 until he resigned in 1898, to be appointed Chief Justice the next year. His wife was a suffragette who was prominent in the women's movement which won the right to vote in New Zealand in 1893. After that victory the movement turned its attention to 'the question of limiting a husband's testamentary freedom.' It appears to have been a particular concern of Lady Stout's who pressed for testamentary law reform by making it a platform of feminist organisations. In the 1893 election campaign, the first at which women could vote, Sir Robert Stout addressed 800 women at the Wellington Opera House. He argued that there was a need 'for some such law ... as that in force in France and Scotland, which would prevent a husband from willing the whole of his property to persons other than his wife, as was often done.'

His appeal to the newly enfranchised women was successful: he was returned to Parliament with a record majority. One shouldn't be cynical: Sir Robert was regarded as a genuine campaigner for women's rights. As Premier, Sir Robert introduced Bills into Parliament in 1896 and 1897 which would have introduced the civil law concept of testamentary disposition in fixed shares to widows and children. The mischief which the Bill was meant

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<sup>13</sup> New Zealand's *Testators' Family Maintenance Act* 1900 – the Stouts, The Women's Movement and Political Compromise 1989 7 Otago Law Review 202.

to remedy was widely recognised and the Bills were praised for their attempt to deal with it, but their inflexibility caused much concern and the Bills were defeated. The second Bill was an attempt to meet these objections but it too was rejected. The basis for the objection was put pithily by one MP:

‘If you attempt to interfere with wills, except so far as it is necessary to prevent the testator from perpetuating an injustice and a wrong, you will go too far.’

After Stout’s retirement from Parliament the mantle of reform fell on Robert McNab who introduced three more Bills in 1898, 1899 and 1900. The third succeeded but each of them embodied the central concept which appears in all family provision legislation with which we are familiar. The innovative clause in the 1898 Bill provided:

‘Should any person die leaving a will, and without making therein due provision for the maintenance and support of his or her wife, husband or children the Supreme Court may ... order such provision as to the ... Court shall seem fit shall be made ...’

Professor Atherton regards this innovation in inheritance law as ‘a brilliant political compromise.’

It became clear in the course of parliamentary debate that the Bill would pass only if its provisions operated on testamentary conduct that was seen to contravene the prevailing sense of morality. It was widely accepted that in many circumstances it was immoral for a man not to make provision for his widow and children but it was not thought to be immoral to disinherit wives or children whose conduct deserved it. A difficulty with Stout’s earlier Bills was that it made provision for the good and the bad alike. The parliamentarians considered that testamentary freedom had to extend to discriminating between family members not simply on the basis of need but of conduct as well. It was to meet this point that the Bill of 1900 included the proviso that the court could refuse to make an order in favour of any person ‘whose character or conduct is such as, in the opinion of the court, to disentitle him or her to the benefit of an order.’

Provisions to the like effect have, I believe, appeared in every subsequent version of family provision legislation.

Given this parliamentary background it is not at all surprising that the judges in their early exposition of the power given by the Act should identify the concept of moral duty as being of central importance.<sup>14</sup> The judicial understanding that the discretionary legislative power had been conferred on the court to rectify the consequence of a breach of duty which morality recognised in a parent or spouse to surviving family members came from the terms of the debate from which the first Testators' Family Maintenance Act emerged.

Another aspect of the parliamentary debates should be noticed. An argument put in favour of the Bills was that their effect would be to relieve the State from the obligation of providing Social Security to disinherited, impecunious, widows and children. What Professor Atherton calls the 'welfare aspect' of the debate raised the question whether the State should be liable for the support of the widow and children or whether support should come from the estate. The consequence of answering in favour of the estate was to say that the basis for intervention was the widow's need and nothing more. The corollary was that the court should make provision for a spouse or child whose behaviour had by any conventional judgment earned the testator's justifiable disdain but who was in need. It was at this point that the parliamentarians balked and refused to pass the Bill until the inclusion of the proviso allowing a testator to disinherit the undeserving. The point for present purposes is that the Act was passed on the express basis that need alone would not justify curial interference with a will: there had as well to be a moral failure by the testator to support a deserving family.

These opposing views, what have been called the 'economic' and the 'ethical' approach to the legislation, found expression in some of the cases. The first

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<sup>14</sup> For this part of my paper I am indebted to another article by Professor Atherton – 'The Concept of Moral Duty in the Law of Family Provision – A Gloss or Critical Understanding?' – 2006 Australian Journal of Legal History 1.

view emphasises the threshold test that an applicant be left without adequate provision. This approach, dubbed the 'economic' approach proceeded on the basis that if the provision made was enough to prevent the beneficiary being eligible for Social Security of some sort and so becoming a burden on the State the testator had not infringed the limits imposed by the Act on testamentary freedom. The second approach, dubbed the 'ethical' approach was to emphasise the requirement that the applicant be left with provision for proper maintenance. This approach allowed for more flexibility in the assessment of the questions whether an applicant was entitled to relief and if so to what extent. 'Proper maintenance' could take into account the size of the estate and the standard of living of the applicant during the testator's lifetime.

Kitto J in *Worlidge v Doddridge*<sup>15</sup> noted the rival contentions, summarised their expressions and observed that the Privy Council in *Bosch* had settled the debate in favour of the 'ethical' approach but warned that:

'The hypothesis of a just but not loving testator is resorted to, not for the purpose of determining what would have been the ideally fair manner of disposing of the ... estate, but only for the purpose of determining what was sufficient for the maintenance and support which the circumstances make it right that the applicant should have, as distinguished from what was sufficient for the maintenance and support which the applicant may be considered to need.'

It is, I think, a mistake to regard the economic theory of family provision as being devoid of moral content. On this view of the legislation the limitation on testamentary freedom is justified by a utilitarian principle. If the testator does not support his family the State will have to do so at a cost to its resources which will be depleted and affect its capacity to supply the needs of others. The estate is burdened and testamentary freedom is curtailed so as to relieve the State of expenditure on its citizens. But this justification is not only about economics: it is about morality as well. To say that the State should not have to support disinherited widows and children is to pass a moral judgment. Social Security legislation conferring pensions and benefits on the elderly, the disabled and the indigent apply alike to the good and the bad, the industrious

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<sup>15</sup> (1957) 97 CLR 1 at 16-17.

and the lazy, the deserving and the unworthy.<sup>16</sup> Such legislation exists to support the destitute on no other basis but that they are unable to support themselves. Why should a testator not be free to dispose of his estate as he pleases in the knowledge that the State will provide a minimum level of support by means of legislation enacted for that purpose.

The answer can only be that the conventional judgment of society is that it is wrong, or unjust, or immoral, for a man to throw the burden of supporting his wife and children on the State which must in turn pass on the burden to its taxpayers and diminish the amount available to those who are in need and who have no connections to give them support.

The conclusion must be that, however one views the legislation, the approach to the jurisdiction it confers is rooted in an understanding that the testator has offended conventional morality with regard to his property and his family. One cannot therefore divorce the concepts of moral duty and moral claim from applications for relief.

The notion that a breach of morality was involved in not making adequate provision for wife or child who had not misbehaved was not an invention of New Zealand's legislators in the late nineteenth century. The origin of moral judgment as being integral to family provision goes back centuries to the theories of property which established the principle of testamentary freedom. These theories began with the 17<sup>th</sup> century philosopher John Locke whose ideas were developed by the 19<sup>th</sup> century utilitarian Bentham and the liberal Mill. These thinkers saw the power of testamentary disposition as a natural extension of the right of disposition *inter vivos*. Mill thought that:

‘The ownership of a thing cannot be looked upon as complete without the power of bestowing it, at death or during life, at the owner's pleasure.’<sup>17</sup>

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<sup>16</sup> With the exception that unemployment benefits are now conditional upon attempts to find work.

<sup>17</sup> Mill *Principles of Political Economy* 1848 Book 2 Chapter 2 [4] quoted by Atherton *op. cit.* at 18.

Locke thought that the power of testation had distinct societal benefits. It made children deferential and obedient to their parents in the expectation of inheritance. Bentham took this notion further. He thought the power conferred a sort of personal fulfilment on the testator, who was always the father, a married woman having no property rights of her own. It allowed him to exercise a judgment as to who had deserved his bounty and who had not. The power was to be exercised for a proper purpose: to reward the virtuous and punish the bad. It called for a correct moral judgment as to which was which. To exercise power fairly and for its proper purpose is a form of virtue so that the just disposition of a testamentary estate enhanced the moral worth of the testator and added to the good order of society.

Both Bentham and Mill agreed that testamentary power conferred an important incentive on children to behave and allowed a father to reward meritorious conduct and punish vice. Mill also thought that children were entitled to expect maintenance and education to an extent which would make them independent and self-reliant so that they had 'a fair chance of achieving by their own exertions a successful life' but no more than that. By contrast he thought it wrong to leave a person so rich that he could live without the necessity of exertion on his part. He favoured a limitation on the amount that might be given to a child.

So the theories of property law and of testation in particular included notions of limitation which were imposed for the personal and social good of those affected by the limitation: both testator and beneficiary. The power of testamentary disposition was to be exercised within 'a framework of moral responsibility.'

This understanding is very clearly seen in the judgment of Cockburn CJ in *Banks v Goodfellow*.<sup>18</sup> The case is usually cited for its exposition of testamentary capacity but it is important in the present context. The Chief Justice said:

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<sup>18</sup> (1870) LR 5 QB 549 at 563-4.

‘The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given ... the English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law.’

The moral responsibility of ‘no ordinary importance’, i.e. of extraordinary importance, must be that of providing for the maintenance, education and advancement of children and the maintenance of a widow in her old age. Conversely, a widow and children had a moral right or claim to receive testamentary support and a widow had a right to financial independence. Though the Chief Justice recognised that the ‘instincts, affections and common sentiments of mankind’ were the best means of securing the most beneficial testamentary disposition yet human frailty may lead to ‘the neglect of claims that ought to be attended to’. It was to provide for those neglected claims that the Testators’ Family Maintenance legislation was passed. The power it gave the court was to remedy the failure of moral responsibility which had led the testator to neglect the claim he should have attended to.

Seen against this background the appeal to moral duty and moral claim is not a gloss on the legislation or a substitute for its terms but a plain recognition of the genesis of the legislative power to interfere with a testamentary disposition.<sup>19</sup>

It must not be forgotten that the words ‘moral duty’ or ‘moral claim’ do not appear in the statutes and it would be a mistake to substitute them for the

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<sup>19</sup> Atherton *op. cit.* at 25.

statutory language. The role of those phrases, and the concepts they express was usefully described by Gleeson CJ in *Vigolo*:<sup>20</sup>

‘Each of those judgments is to be made by reference to criteria that are expressed in the most general terms. Two of the key words are “proper” and “fit”. Fitness and propriety are value-laden concepts. Those values must have a source external to the decision-maker. Morality is a source of many of the values that are expressed in the common law, in statutes, and in discretionary judicial decision-making.’

And:

‘Similarly, when courts came to address the discretionary question of making fit provision, they had to consider the interests of those upon whom the burden of an order might fall. In making decisions, courts have had regard to competing claims upon a testator ... . It would now be regarded as self-evident that a court would be readier to disturb a testamentary provision in favour of a beneficiary, such as a charity, with whom a testator had no connection than a provision in favour of dependent relatives. Why is this so? The answer, again, lies in concepts of moral obligation.’

And:

‘In *Singer* ... Mason CJ, Deane and McHugh JJ doubted that the statement of Salmond J provided useful assistance in elucidating the statutory provisions. I do not share that doubt. I add, however, that it is one thing to seek assistance in elucidating statutory provisions, and another to substitute judicial exposition of statutory purpose for the legislative text. Their Honours went on to describe references to “moral obligations” as a gloss on the statutory text. If ... they meant that such references are not to be used as a substitute for text, I agree. If they meant that such references are never of use as part of an exposition of legislative purpose, then I ... am unable to agree.’

The Chief Justice referred with apparent approval to the judgment of Ormiston J in *Collicot v McMillan*<sup>21</sup> in which his Honour analysed the cases that have described the testator’s duty to make provision for his family as a moral one. Ormiston J said this:<sup>22</sup>

‘The expression “moral duty” remains a simple and convenient way of referring to the obligation ... resting upon a testator to make a wise and just assessment of the interests of all persons who might fairly ask to be taken into account in determining what adequate provision

<sup>20</sup> 221 CLR 191 at para 6; 13-21.

<sup>21</sup> [1999] 3 VR 803 at 815-821.

<sup>22</sup> At 819, 820.

for proper maintenance and support should have been made for them had the testator been fully aware of all the relevant circumstances. ... It is sufficient to say that the word “moral” used in connection with the legislation is apt to describe what is generally considered, according to accepted community standards, to be the obligation of a testator to do what is right and proper for those members of his or her family whom one would expect to be entitled to share in the distribution of (the) estate on death. Indeed the word is particularly apposite when considering family relationships and the obligations arising for the purpose of ascertaining what is right and just as between members of a family.’

The second basis for confidence that the concepts of morality have a place in this part of the law is found in the substantial number of decisions of the High Court itself in which the concepts have been utilised and their expression approved. In *Coates v National Trustees Executors and Agency Co Ltd*<sup>23</sup> Dixon CJ stated that:

‘... The views expressed in ... *Allardice* have provided the source whence the principles derive which have guided the courts in the administration of the Acts. They were restated by the Privy Council in *Bosch’s* case ... . ... These observations conform with the views expressed in ... *Allen v Manchester* ...’.

I have set out the relevant passages from these cases earlier in the paper. They are the passages which speak of the testator’s moral duty. Williams J, Webb J and Kitto J in their separate judgments each referred to the jurisdiction to make provision depending upon the existing of a ‘breach of moral duty by the testator’.<sup>24</sup>

Then in *The Pontifical Society for the Propagation of the Faith and St Charles Seminary Perth v Scales*<sup>25</sup> Dixon CJ, with whom McTiernan J agreed, repeated the applicability of the principles expressed by Salmond J in *Allen* and by the Privy Council in *Bosch*.

Later in *Hughes v National Trustees Executors and Agency Co of Australasia Ltd*<sup>26</sup> the leading judgment was given by Gibbs J, with whom Mason and

<sup>23</sup> (1956) 95 CLR 494 at 509.

<sup>24</sup> At 512, 516 and 526 respectively.

<sup>25</sup> (1962) 107 CLR 9.

<sup>26</sup> (1979) 143 CLR 134.

Aitken JJ agreed. His Honour<sup>27</sup> accepted with approval what had been said in *Bosch* and in *Allen*, that the legislation was:

‘... designed to enforce the moral obligation of a testator ...’.

The High Court again referred to the matter in *Goodman v Windeyer*.<sup>28</sup> Again the leading judgment was written by Gibbs J, with whom Stephen and Mason JJ agreed. On this occasion also Gibbs J referred with approval to *Bosch* and again quoted from the judgment of Salmond J in *Allen*.

Scepticism that questions of moral duty or moral claim are necessary or helpful when considering applications for provision is found only in judgments<sup>29</sup> of two judges in these cases before the joint judgment in *Singer*. The passage which gave rise to controversy appeared as *obiter* and appeared to be contradicted by a later passage in the same judgment, as Gleeson CJ pointed out.<sup>30</sup> One must, of course, include in the expression of minority opinion the joint judgment of Gummow and Hayne JJ in *Vigolo* which expressly doubted the utility of considering applications for provision by asking whether there has been a breach of moral duty in the testator.

Callinan and Heydon JJ in their joint judgment pointed out that Mason CJ, who was party to the *obiter dictum* in *Singer*, had in earlier cases expressly agreed with the reasons of Gibbs J which endorsed the ‘moral duty’ principle for determining applications.<sup>31</sup> Their Honours summarised the state of authority in the High Court:<sup>32</sup>

‘For many years therefore several Justices of this court have found it convenient and generally useful to resort to the concepts of a moral duty and a moral claim in deciding both whether and how much provision should be made to a claimant under the Act. In our respectful opinion they have not been wrong to do so. These are not concepts alien to, or in any way outside, the language of ... the Act.’

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<sup>27</sup> At 146, 147.

<sup>28</sup> (1980) 144 CLR 490.

<sup>29</sup> Fullagar J in *Coates* at 523; Murphy J in *Hughes* at 159 and in *Goodman* at 504.

<sup>30</sup> *Vigolo* at 203.

<sup>31</sup> *Vigolo* at 230.

<sup>32</sup> *Vigolo* at 230.

The weight of authority is decidedly in favour of resorting to conventional morality when deciding whether proper maintenance has been afforded a claimant and what provision is fit. There are compelling reasons of history and jurisprudence which have led to that authoritative expression of opinion. I think it is therefore safe to act on the basis that the traditional and orthodox view has been reasserted and it is both safe and appropriate to act upon that understanding.

This leads me on to something else I want to say. It concerns claims under s 41 by adult children who are not in necessitous circumstances and the estate, or much of it, has been left to charity.

What I am about to say expresses a personal opinion and not any objective analysis of case law. I should also declare my interest in the topic: I am the chairman of the Cancer Council Queensland, the largest cancer research charity in Queensland which derives a substantial income from bequests. On average about one will in ten which benefits the Cancer Council is the subject of an application for family provision by adult children. Now you understand my interest in the topic.

*Vigolo* was a case of an adult son who was not in need. He had substantial assets, the value of which was not much less than the value of the testator's estate. He was far wealthier than his siblings who were the beneficiaries. The applicant had contributed to building up his father's estate but had received full value for his efforts and had been the beneficiary of a substantial gift under his mother's will. The application was dismissed because he was not in need and had no particular moral claim on the testator.

As you all know, courts have been circumspect in dealing with claims by adult children, particularly adult sons. There should, in this day and age, be no difference when dealing with claims by adult daughters, at least if the daughter is earning or is capable of earning sufficient to make her financially independent.

The classic exposition of the approach taken by the court to such claims is the judgment of Fullagar J in *Re Sinnott*.<sup>33</sup> He said:

‘No special principle is to be applied in the case of an adult son. But the approach of the court must be different. ... An adult son is ... able to “maintain and support” himself and some special need or some special claim must, generally speaking, be shown to justify intervention ... under the Act.’

And:

‘In the case of an adult son, who has received an education and is well able to earn his living, the father’s moral obligation can probably in most cases be regarded as discharged, and a wise and just testator may well feel himself at liberty ... “to do what he likes with his own”.’

*In Re Sinnot* was approved by the High Court in *Hughes*, and by Gleeson CJ in *Vigolo*.

It has seemed to me on occasions that the authority of *In Re Sinnot* has not been given proper recognition in cases where the competing claims are those of an adult child and a charity. It appears that there is an implicit assumption that the charity had no moral claim on the testator who correspondingly had no moral duty to benefit it. The contest is regarded as one between a claimant who *prima facie* had a moral claim on the testator, and a beneficiary who did not.

Of course every case must be decided on its merits and many factors must be considered including the size of the estate, the relationship between testator and children and the nature and extent of competing claims. But generally speaking an adult child financially independent or even in affluent circumstances should have no claim on an estate left to charity particularly where there had not been a close relationship between parent and child for many years, though even that factor is of subsidiary importance.

I suggest that if cases were determined in accordance with established, orthodox, legal principle testamentary gifts to charities would not be disturbed

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<sup>33</sup> [1948] VLR 279 at 280, 281.

on an application by an adult child who cannot demonstrate some special need or special moral claim. Often the moral claim is proved by evident need, but an adult child established in life who has made his or her own way will seldom be able to demonstrate the requisite need. I suspect that these principles are sometimes overlooked in the settlement of claims whether in a mediation or by direct negotiation. It is for that reason that the Board of the Cancer Council has resolved that, allowing for proper deserving cases, it will insist upon the administration of estates in accordance with the will where it is a beneficiary, and it will require a claimant to prove his or her case to the satisfaction of the court. Although I cannot speak for any other charity there are, I think, indications of a similar attitude developing.

It is perhaps worth pointing out that when speaking of such a contest, Gleeson CJ in *Vigolo*<sup>34</sup> spoke of the readiness of the court to disturb a testamentary gift in favour of a charity 'with whom a testator had no connection (rather) than provision in favour of dependent relatives.'

I stress that the qualification, dependent. The Chief Justice referred to *Coates* in which Dixon CJ had referred<sup>35</sup> to a testatrix who had 'turned away' from her only child to leave her estate to 27 charities in none of whom she had any special interest.<sup>36</sup>

I wish to suggest that attitudes have changed, or are changing, and that the courts ought to consider that there are or may well be moral duties on testators to benefit charities.

My reason for saying this is the importance of charities to the social fabric of our community.

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<sup>34</sup> At 200.

<sup>35</sup> At 510.

<sup>36</sup> In *Coates* the estate was very large: the only son was in modest circumstances; and had spent much of his adult life helping his mother in her business ventures which led to the amassing of her fortune. The son was given a tiny annuity which the High Court increased.

Let me quote from an Industry Commission report in 1995, now quite old. It said:

‘... Australian society is supported and served by a not for profit charitable sector which delivers a range of social welfare services to its citizens. ... The sector ... pre-dates any form of comprehensive government intervention on behalf of people in need. It arose from the compassion, goodwill and foresight of men and women of philanthropic, humanitarian and religious convictions and has continued to serve, expand and diversify since early colonial days. The charitable sector underscores many basic values in Australian democracy. It exemplifies the principles of pluralism, free choice and the rights of citizens to participate in and take responsibility for their community. It helps ensure that no government has a monopoly on the way society deals with its citizens – especially those who are most vulnerable because of economic or personal need.’

Professor Mark Lyons has written:<sup>37</sup>

‘Non-profit organisations make an even more important contribution to society through their demonstration of, and mass encouragement for, collective action. They play a central role in the regeneration of social capital. Non-profit organisations also sustain and shape a democratic political system. They are the “elementary schools of democracy”.’

Charities, and not for profit organisations attract the support of huge numbers of people. In 2004 6.3 million Australians, that is 41 per cent of all adults in the country, volunteered their services and gave 750 million hours of labour to non-profit organisations. The value of that unpaid labour, at appropriate hourly rates, was \$13.3 billion. In 2003 over 13 million Australians, that is 86 per cent of all adults, belonged to one or more non-profit associations. 48 per cent belonged to three or more. About a million people held office of one sort or another in non-profit organisations.

These organisations attract enormous public financial support. In 2004 13.4 million Australians made donations totalling \$5.2 billion. A further \$2 billion came by way of the proceeds of raffle tickets or profits from charity auctions and similar events. Less than \$1 billion of those donations were claimed as a tax deduction.

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<sup>37</sup>

Third Sector: the contribution of non-profit and co-operative enterprises in Australia.

The not for profit sector has an important economic impact as well as a social one. It employs over 600,000 men and women and in the year 1999/2000 had an income of \$33.5 billion, of which \$21 billion contributed to the national GDP. To put that in context it is greater than the contribution made by farming and almost twice the size of the entire economic contribution of Tasmania. If you add to the actual financial contribution the value of unpaid volunteer labour the financial contribution comes to \$8.9 billion which in 2000 was greater than that of the mining industry.

These figures indicate two things: the first is that charitable organisations have a value measurable in economic contribution as well as social and humanitarian terms. The second is that very large numbers of the public are actively involved in their activities, or support them financially.

The mark of a civilized society is how it cares for its citizens who cannot care for themselves. Charities, as we all know, provide physical help and emotional encouragement to the destitute, the dispossessed and the afflicted. One only has to think of the work of the Salvation Army, St Vincent de Paul or the Smith Family. Other charities, of which the Cancer Council is one, undertake research to find ways of overcoming insidious diseases, thereby improving the health and quality of life of individuals and populations. The benefits are individual and universal.

Some conclusions follow. Testators who are responsible citizens could not be ignorant of the importance of charities and their value to society. As we all benefit from living in a society so we all have an obligation to maintain and improve it. There is, I suggest, a moral aspect to the support of charities which alleviate suffering and promote the common good. It cannot be said that there is no moral duty to provide them with financial support. There is and always will be a natural (or moral) tendency to advance children by testamentary gift but there is also a natural or moral inclination to assist those who work unselfishly for others and for the good of society. A testator's desire to discharge this moral duty should not, I think, be ignored or denigrated by an

unquestioning assumption that 'family comes first'. It may, or may not, depending upon the testator's assessment of where his or her duty lies.

I expect that these considerations will assume increasing importance in applications under the *Succession Act* in the times ahead.