

A “Thankless” Office? Reconsidering the Charitable Trustee’s Standard of Care under Scots Law

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“As trust is gratuitous, and too often a troublesome and a thankless office, trust-deeds generally contain, as an inducement to undertake it, a clause exempting the trustees from liability for omissions, and restricting their responsibility to their own actual intromissions.”

- Bell, *Principles of the Law of Scotland*, 4th edition, 1839, s2000

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Introduction

This paper asks whether charitable trustees should be held to a distinct standard of care under Scots trust law. A charitable trust which passes the charity test becomes identifiable by law as a charity, and hence falls under the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). Trusts of this kind are the subject of this research paper, and under the 2005 Act, trustees of charities constituted by charitable trust will be part of the larger classification of trustees known as “charity trustees”.¹ Answers to such a question are not found simply by elucidating charities’ nature as being “good”, public-facing, or increasingly regulated over time. Nor are they found by holding out the fact that trusteeship is voluntary and historically unpaid as reasons for how lenient charity trustees should be treated. Evidently, both findings are true: some may lean

¹ Which includes members of boards or directors if the charity is instead a company or a Scottish Charitable Incorporated Organisation (SCIO), as examples.

towards encouraging a more observant eye to be kept on charity trustees, because of the impact their charities have on the public, and the law's historical encouragement of public trusts; whilst others may lean towards leniency, as courts have shown caution lest the office become unattractive to those willing to undertake it.²

The argument developed here in response to whether trustees should be held to a distinct standard will be of a deliberately exploratory nature. It begins with Bell's portrayal of trusteeship as a gratuitous, troublesome and "thankless" office. It then ponders whether that perspective can still hold up in today's modernised charity sector governed by statutory, public and regulatory duties or expectations. Bell's description remains an important starting point not only for charity trustees but for ordinary trustees generally. Take modern private trusts, for example: many may involve substantial asset value or complex administration needs, and could require professional advice and sophisticated investment decisions. The genealogical contrast does not elicit comparison between a private trustee and a charity trustee. Instead, we must ask whether charitable trusteeship has distinctive legal features³ which alter the practical context of ordinary prudence.

The paper shall then continue, considering section 66 of the 2005 Act against the whole breadth of common law and, once commenced, section 31 of the Trusts and Succession (Scotland) Act 2024 ("the 2024 Act"). Along the way, we wonder: Should the consequences of public beneficiaries experiencing loss justify the need for more experienced or prudent trustees? Would such public purposes of a charity justify limiting trust-deed autonomy? And finally, could the *sui generis* feature of charity trusteeship prove to be found in accountability and enforcement?

When concluding, it becomes clear that the charity trustee office does not require a new, perhaps professional, standard. The ordinary prudence standard continues to be a proper fit if it is applied contextually: this means each charitable trust would be situationally different. The standard would account for the charity's purposes, size, reach, and risks; consider the vulnerability of those affected and how well the trust can be monitored; the trustees' role and any expertise undertaken; the information and advice reasonably available; the effectiveness of the decision-making process; and how warning signs have been handled. Research into the statutory and regulatory environment has also been taken into consideration during this paper's process: OSCR guidance, inquiry powers and remedial intervention do not create a separate negligence test at common law, but it helps to show what responsible charity governance looks like. Charity trusteeship is therefore distinctive less because it requires a higher or lower standard, but more because administration that rests upon public benefit changes what prudent performance is in practice and how mismanagement is corrected. This approach is not attempting to figure out whether the charitable office is a professional one, nor a lenient voluntary one. It is about understanding what it means for there to be responsible stewardship.

² *Andrews v Ewart's Trs* 1886 13 R (HL) 69, p 73 per Lord Watson

³ Such as public-benefit purposes, statutory duties, diffuse beneficiaries and regulatory supervision.

1. Bell's "thankless" office: the right beginning, but not the end of the story

Reading institutional writer George Joseph Bell's description of the trustee as holding a "troublesome and thankless office" encourages our critical mind to start at the outset of the genealogy of trust law. He wrote his theories at a time when trusteeship was generally gratuitous. A time when an individual could become a trustee by means of family loyalties, social standing, community responsibilities or on the sole basis of the truster's personal confidence. For those who would be wary of taking on such a role, an immunity clause⁴ was common; it offered reassurance that certain honest mistakes were to be forgiven, in advance, by the truster, or, at the very least, that circumstantial errors or omissions may not ruin the trustee.

Bell's writing should not be seen as treating trustees leniently; it was seen as a role of responsibility regardless of the fact that it was an unpaid one. Scots law had developed an objective ideal of how a trustee should be, traditionally expressing it as the *bonus vir*: where the trustee is required to act with ordinary prudence and where one's negligence towards their own privately held assets is no justification for acting the same with the trust's assets impressed with a fiduciary character.⁵ There need to be individuals willing enough to accept the position of trustee, yet trustees need to be sufficiently capable to care for another's property.

Let us also consider the private trust side, because the question at hand is not whether charity trusteeship is generally demanding but whether charitable trusts find themselves in circumstances which make the ordinary standard different from its application to a conventional private trust. It would not be unusual for a private trustee to manage a family trust for identified beneficiaries, who have a personal interest and are likely to keep an eye on how the trust is performing. Contrastingly, a charity trustee might be responsible for a school endowment, a religious trust, a welfare charity, or a local community cause, and, on a broader scale, a charity can employ employees, enter into large contractual obligations, hold investments, engage volunteers, and have vulnerable beneficiaries. It is therefore tempting to think that the charity trustee has "more" actions to take for the trust to perform as its deed demands, and so naturally that could mean they should be subject to a higher standard. Yet the size of a charity and the activities it carries out to fulfil its charitable purposes can vary significantly across the field. A charitable trust charity may often be small, meaning it has few resources, unpaid trustees, and no individual specialised in the financial aspects of the trust's activities. A larger charity may be a company that typically manages major assets and employs professionals. What matters is not simply the amount of work required, but the kind of care, judgement, and oversight that's reasonable for each trustee's situation.

⁴ Also known by "exemption clause", "exculpatory clause", "exoneration clause", or a relief/protection clause

⁵ *Knox v MacKinnon* (1888) 15 R (HL) 83, p 87 per Lord Watson

Three separate facts define a charity trustee's role. First off, sometimes a charity trustee may be expected to exercise greater skill or vigilance than an ordinary non-specialist trustee. This may arise where the trustee has accepted a specialist role, has been selected or relied upon because of relevant expertise, has represented that competence, or is responsible for a decision involving greater risk or impact. Regulators and the SLC have focused on the level of care needed for the trustee's specific responsibilities and the requirements needed to support the trust's purposes, not whether every trustee is a professional.⁶ Second, charity trustees owe additional statutory duties compared to private trustees (see subsection 66(1)(a) and (c) of the 2005 Act). Third, charity trustees work in a regulated environment, which affects how their care and diligence are weighed, as OSCR guidance may not be legal instruction, but it still creates a standard based on recommended practices and reasonable activity by a charity trustee. Their guidance has touched on areas like identifying skill gaps within the charity's trustees, setting up inductions for new trustees, and addressing the specificities of a conflict of interest.⁷

Before moving on, let us review some information to keep this area of the law clear to readers. A trustee of a charitable trust is a trustee in the traditional trust law sense, but a charity trustee is what the 2005 Act identifies as a person having general control and management of a charity. Given there are various forms of 'charity trustee', what they all share is section 66 of the 2005 Act; yet, depending on the charity's constitutional form, there can be additional duties set upon trustees. For a charitable trust, the additional duties are those in section 31 of the 2024 Act; for a charitable company, they are the duties under the Companies Act 2006 (sections 171-177).⁸

The charitable nature of a trust and, by extension, a charity, is not reason enough for a uniformly higher standard of care. The ordinary prudence standard, which we will go into next, is a suitable soundboard for a more situational approach to the standard expected of trustees with varying experience, skill, and specialisation, and of trusts with varying demands and public impact. The fact that a charity may lack specialist expertise among its trustees, and that this can create potential weaknesses, means that perhaps for there to be a prudent trustee board, such trustees must be able

⁶ OSCR, "Recruiting charity trustees" (30/06/2025) <https://www.oscr.org.uk/managing-a-charity/managing-charity-trustees/recruiting-charity-trustees/> accessed June 15th, in particular see section on Identifying the charity trustee requirements you need and creating a role description; *Scottish Law Commission*, Discussion Paper No 148 (2011), paras 6.7-6.10

⁷ *ibid*, "Before you begin recruiting new charity trustees, it's important to take a step back and evaluate the current strengths and gaps on your Board... Once you've mapped out your current Board's capabilities, this should help you identify any critical skills missing and establish if you have diverse perspectives and lived experiences that reflect your beneficiaries. Based on the gaps you've identified, write a brief but clear role description for the new charity trustee. This should include: the skills or experience you're looking for, the time commitment expected, any specific responsibilities, and a short summary of your charity's mission and values... [this] gives potential candidates a clear understanding of what's expected."

⁸ The Supreme Court's discussion in *Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33 can be useful comparative support for thinking of fiduciary duties in a charitable corporate setting as directed to the charity's objects, though it is not authority on the 2005 Act.

to identify gaps in competence. Gaps may be filled by recruiting new trustees with the needed skills and experience, delegating tasks to those better equipped to do so, or seeking external advice.

2. The ordinary trustee's standard of care

To argue either for or against creating a standard of care specific to the office of a charity trustee, we must first begin by investigating what the standard of care for a traditional trustee is at its core. Let us now explore the trail of precedent that common law has left.

In *Knox v Mackinnon*, trustees made an accommodation loan to a beneficiary on seemingly precarious security and continued it even after the other beneficiaries, the borrower's siblings, objected. The beneficiary, William Millar, had purchased premises, and the trustees had covered part of the price as a loan so that he could acquire the property. The whole transaction took the shape of an accommodation loan to benefit William, rather than it being a *bona fide* investment of the trust funds.⁹ The Lord Chancellor explained how the trustees had allowed the property to be conveyed to Millar despite knowing he could not pay, then lent him £12,000 on already charged property; it was "not in truth as an investment at all, but as a method by which" he could appear to pay the purchase price.¹⁰

The argument that a gratuitous trustee should be judged by the care they show in managing their own affairs was, interestingly enough, rejected, as such a rule could end up rewarding incompetence.¹¹ A defence could form, based on the case that if a trustee could show they were usually careless with their own assets and activities, then they could be, in that way, relieved of negligence. Trustees would have a "mischievous" incentive to downplay their abilities, claiming carelessness with money, while those going against them would have to try and prove the trustees to be intelligent or shrewd.¹² The judgement also takes care to emphasise that a trustee is managing property for others, not for themselves, and thus must act fairly and solely in the trust's best interests; in this way, favouring particular beneficiaries rather than ensuring the safety of the trust estate breaches such responsibility.¹³

Raes v Meek demonstrated the demands of such a standard of care in practice, where investments can fail for reasons other than negligent trustee decision-making. But in this particular case, the trustees advanced trust money against unfinished buildings without adequate independent valuation or inquiry into likely returns. Because the buildings were incomplete, when the builder went bankrupt, the properties became unlettable, and the trust lost what it had invested. The way

⁹ n5, p 85 per Lord Chancellor Halsbury

¹⁰ n5, p 84, 85 per Lord Chancellor Halsbury

¹¹ n5, p 87 per Lord Watson

¹² n5, p 87 per Lord Watson, p 88 per Lord MacNaghten

¹³ n5, p 88 per Lord MacNaghten; For fiduciary ownership, although legal title and powers may vest in the trustees, they are exercised for the trust purposes and the interests of those beneficially interested, not for a trustee's own advantage or for preferential treatment of one beneficiary

the trustee entered the investment, without independent valuation or an assessment of rental potential, was seen as giving in to speculation rather than establishing a sound security; thus, it was held that any prudent person would have foreseen the unsuccessful outcome as probable, or at least as possible.¹⁴ The “umbrella” of the standard of care covers the entire lifecycle of a trustee’s decision: when it was made, what information was obtained, potential negative consequences, and whether the trustee had a rational reason for exposing another’s property to such risks. Even if a trustee has a strong commercial reason for investment, or if the decision seems perfectly normal, it does not protect them from liability unless it is backed by the careful inquiry and safeguards a prudent person would use. For an analogical mental image: if I were to invest in cryptocurrency, I would approach it with much caution as it is still widely known as a volatile industry, yet if I were investing in well-established bonds, am I justified in not taking as much care, meaning I do not do my due diligence in establishing whether it actually is a good investment? If it is “so well known” and commonplace, does that mean I do not need to seek independent advice or valuation? No, it does not. *Raes v Meek* makes it clear that a potentially profitable project cannot be considered a proper investment if its speculative character, value, and expected income have not undergone essential due diligence, such as independent verification.

A similar distinction between a negative outcome and a deficient process appears in later cases. In *Tibbert v McColl*, the court held that the trustees had committed a breach of trust by paying pension money into the employer’s overdrawn current account, because the money was thereby alienated to a third party and trust control was lost. Even though the trustees did intend to pay the beneficiary, this in itself did not remove the conclusion that it was a breach of duty. The issue of causation was then considered separately from remedy: the trustees had to prove that the loss would have happened in any event and if they had done so, they would still be in breach, but they might not have had to restore the loss; but the court held that the real cause of the loss was the earlier removal of trust control by the trustee’s, not the beneficiary’s later failure to cash his cheque.¹⁵

In *Lutea Trs Ltd v Orbis Tres Guernsey* professional trustees made an extraordinary loan, on extraordinary terms, to an individual who could not obtain ordinary financing. The supposed security was worthless, and the trustees offered no adequate explanation for their actions.¹⁶ The court held that the trustees’ primary duty was to preserve, or at least not hazard, the trust estate because a trustee’s role is most definitely not akin to that of Dostoevsky’s *Gambler*.¹⁷

This means the “ordinary standard” is already strict when trustees handle trust assets, delegate control, or make investment choices. The term “ordinary prudence” is not defined as an easy standard. Trustees do not necessarily need to be professionals, but many cases may require a

¹⁴ *Raes v Meek* (1889) 16 R (HL) 83, p 34-35 per Lord Herschell

¹⁵ *Tibbert v McColl* 1994 SC 178, p 181-182

¹⁶ *Lutea Trustees Ltd v Orbis Trustees Guernsey* 1997 SCLR 735, pp 744, 747 per Lord McCluskey

¹⁷ n15, p 737 per Lord Justice-Clerk Cullen; *The Gambler* by Fyodor Dostoevsky

trustee to be able to recognise if a decision, such as a decision whether to enter into an investment, exceeds their competence. The case law at hand nevertheless does suggest that the standard of ordinary prudence may be higher if the trustee's role, expertise, or the present and potential risks then make extra skill, advice, or care reasonable.

3. Public benefit, diffuse beneficiaries and why the charity setting matters

If the ordinary standard is already objective, what sets the charitable entity apart? The answer lies in the nature of charitable purposes and who benefits from them. The case of *Pemsel* established, at the time applicable to Scots law for statutory tax, the technical legal meaning of charity: relief of poverty, advancement of education, advancement of religion, and other purposes which benefit the community.¹⁸ Today, *Pemsel* holds importance not just because it provides an exhaustive test, but because it shows how, in the legal context, “charitable” is classified, how it is not a synonym for kindness. A purpose may be directed at compassionate causes, be for the community, or be politically motivated and supported without being legally charitable. In Scots law, the charity test under sections 7-9 of the 2005 Act sets out the main charitable purposes that are legally recognised. Still, there is also room for more anomalous purposes to be presented for acceptance or rejection.

Inland Revenue v Glasgow Police Athletic Association later demonstrated how an organisation serving a defined membership group is not considered charitable if its purposes are not exclusively charitable and do not positively affect the public in sufficiently direct ways.¹⁹ Although this case was focused on determining whether a trust is charitable, it relates to how a trustee understands their trust's charitable purposes. A trustee should always ask the following question of vires before taking any action: does the proposed activity fall within the charity's purposes and trust deed powers? If not, then the problem surrounds whether it was an imprudent or unauthorised decision; if it does, then the trustees should then consider whether it was carried out prudently with the care, information, and safeguards expected. Good administration depends on trustees understanding what their charity is allowed to do, who they aim to help, and how to serve them well. Even if an opportunity seems financially appealing, it may fall outside the charity's purposes if it requires using assets, staff time, contracts, or risk for something that does not support the charity's goals. Just as a trust's goal may seem community-focused, it may not be solely focused on benefiting the community in its actions.

The public-benefit authorities, such as *Gilmour v Coats*, also apply to our question of the standard of care at hand. The trust was conditional, meaning if the Carmelite community's purposes were charitable, the income went to those purposes; if not, the property was held for the Converts' Aid Society. The House of Lords held that the Carmelite purposes did not meet the “test of benefit to

¹⁸ *Pemsel's Case* [1891] AC 531, pp 567-568 per Lord Bramwell; *Pemsel* displaced the narrower approach in *Baird's Trustees v Lord Advocate*

¹⁹ *Inland Revenue v Glasgow Police Athletic Association* 1953 SC (HL) 13, p 24 per Lord Normand

the community,” so the gift-over took effect.²⁰ If the legal validity of a charitable purpose requires more than the trustor’s sincere belief that an activity benefits the public, then should trustees administering that purpose likewise require more than their own assertion that a proposed use of the trust estate is beneficial? Another important point to approach is how beneficiaries can hold trustees accountable. Beneficiaries of private trusts often might not have the money, knowledge, or legal standing to question what trustees do, but they do have the legal right to do so, and especially to inquire by way of requesting information on the trust estate.²¹ Conversely, beneficiaries of charities may be able to raise concerns with the OSCR if they are even aware that they are a beneficiary.

Nevertheless, a conventional private trust ordinarily has identifiable beneficiaries with proprietary interests who may seek information, challenge administration, give consent where legally relevant, or apply to the court for relief.²² But a charitable beneficiary may not be so easily identifiable; they may become a beneficiary in the future by being in hardship, becoming a member of a community, or part of a class supported by charitable trusts. No individual may have sufficient information or incentive to monitor trustees or take action against them. This is why the OSCR exists as the watchdog over charities. Of course, their watchful eye does not change the fact that the trustee-to-beneficiary relationship is naturally very different in public trust law than in private trust law. The reasoning that appears within cases which concern public benefit can demonstrate why a prudent decision-making process in a charity must be impact-minded, transparent, and capable of public explanation. Where beneficiaries cannot readily act as supervisors of the trustee, record-keeping, conflict management, scrutiny and regulatory accountability to the OSCR are functional substitutes for the beneficiary rights of private trusts.

It is worthwhile to view the public-purpose *McCaig* cases through a visionary lens.²³ Pieces of the ratios here brought up whether something was of benefit, in any way, to the public, with Lord Kyllachy stating “objects of no utility, private or public, objects which benefit nobody” and the Lord Justice Clerk pondering “Where is the beneficial interest the trustees are required to protect? Where is the beneficiary that is preferred to her?”²⁴ Pushing the boundaries a bit, we must wonder: if the law tests whether a purported public purpose is actually capable of providing benefit, then trustees should also make sure their actions keep that benefit real and enduring. This is especially relevant when trustees have ongoing discretion over the use of charity property, rather than when they are carrying out a fixed and uncontroversial direction by the trust deed per say. This is not to say that trustees need to periodically reconsider the charitable status of the trust’s purposes; it is just that those who make material decisions about how to carry out the trust purposes should always check that their approach still helps solely to achieve the charitable goal.

²⁰ *Gilmour v Coats* [1949] AC 426, p 446 per Lord Simonds, and also see p 447 for discussion of “belief” in purposes

²¹ See the prospective section 30 of the 2024 Act on information rights

²² s30, s30(9), s32(1)(b), s38 of the 2024 Act

²³ For more discussion of the *McCaig* cases see GL Gretton and AJM Steven, *Property, Trusts and Succession* (5th edn, 2024) paras 26.4-26.5 and 26.10-26.12

²⁴ *McCaig v University of Glasgow* 1907 SC 231, p 5-6; “her” in the latter quote is the testator’s sister, the heir-at-law.

The idea of public benefit suggests that when there is less direct ‘traditional’ oversight by beneficiaries, there should be stronger requirements for transparency, explanation, internal controls, and public say-so. Even though there is a lack of identifiable beneficiaries in the same way there is in private trusts, charity trustees must still understand the loyalty they owe to those who will benefit from the charity, and how much is at stake if things go wrong.

4. The case for a higher standard of care

Instead of quickly dismissing the idea of a higher or more demanding standard of care, it is worth considering it more closely. Those who benefit from charitable trusts may be numerous; they may change often, and often involve vulnerable individuals and causes. The importance of public benefit lives on beyond determining whether a trust is charitable when it is being set up. It also sets out the social reason why charity property is held and who may be affected depending on how it is managed. For example, the Stevenson Trust focuses on addressing community needs, one of which has been for affordable housing, so if something were to go wrong in its administration, those with limited housing alternatives would be at a loss (as an example of only one of their funds/projects).²⁵ In the case of the Mustardseed Trust, which works towards a “world of care” and missions multiple purposes such as environmental and welfare needs, and as an example, one of its initiatives it supports, WorkFREE India, supplies 1,250 individuals with an unconditional universal basic income, so if there were a collapse within the charity, the support those individuals rely on would be at risk along with the many other projects it is currently supporting.²⁶

Discussing examples of what charities do, and who they do it for, shows how poor administration, if it occurs, can have effects beyond reducing the trust's distributable wealth. Services stop, staff go unpaid, projects get put on hold or, worst case, permanently crippled by loss of funds, and beneficiaries go unbenefited, left without support they may have seriously relied on. This does not mean that charity trustees should be able to 100% guarantee service delivery, nor that every trustee must meet a professional standard in expectation that it lowers the risk of misadministration. But it does mean that potentially negative public impact can make some trust situations more complex. A decision involving large assets being used, a decision to support projects or vulnerable groups of individuals who do not easily attract regular finance, investments or government support, or a decision involving a risk of failure requires more careful inquiry, advice taken, monitoring, and escalation than a routine decision in a low-risk situation. Ordinary prudence remains the legal baseline, but considering the environment in which charity law and charitable trusts operate and the seriousness of what is at stake may alter what prudent decision-making requires.

²⁵ (SC024662) see OSCR page <https://www.oscr.org.uk/about-charities/search-the-register/charity-details?number=SC024662>

²⁶ (SC042311) see OSCR page <https://www.oscr.org.uk/about-charities/search-the-register/charity-details?number=SC042311> ; see charity website: <https://mustardseedtrust.org/about-us/>

The strongest argument is therefore that the ‘charitable-trustee’ office requires responsible capability, which means ensuring that the trust has access to competence, information and procedures which its purposes, assets and risks require, based on the specific circumstances of that trust. An unpaid trustee may lack specialist knowledge without being negligent, yet voluntariness does not excuse failure to recognise when specialist assistance is needed.²⁷ It is worth mentioning that certain guidance by the OSCR contrasts this argument slightly as it makes it out to appear that certain experience and skill is a requirement when “hiring” charity trustees, but we shall come to discuss this later on in the research paper.²⁸

The public-benefit reasoning discussed above does strengthen the argument without itself being focused directly on addressing the standard of care. If charitable status depends upon a legally cognisable and sufficiently encompassing public benefit, then it is arguable that trustees should be able to assess how significant uses of the trust estate advance that benefit. Trustees’ own sincere belief that a decision is worthwhile should not always be enough. Which makes s19(3) of the 2024 Act curious, as it allows a unified decision by trustees to be reason enough not to seek advice on a decision to make use of the trust estate where obtaining advice would be unnecessary or inappropriate.²⁹ The provision therefore allows trustees to use their judgment in routine and low-risk matters, while making the quality of their reasons, information, and competence crucial where the decision is unusual, high-risk, legally uncertain, or materially connected to the charity’s purposes (see subsections 19(1)-(4) of the 2024 Act).

The question for the following sections is whether Scots law should recognise a distinct charitable-trustee standard of care, or whether the more suitable approach is to apply ordinary prudence, contextually, to the public-benefit office the trustee holds. The latter is more faithful to statutory language and to the distinction made in section 31 of the 2024 Act between qualifications and professional functions actually undertaken.

5. Section 66, section 31 and the contextual application of ordinary prudence

As discussed earlier, charitable trusteeship may have acquired features associated with professional responsibility: this is because it involves public-benefit property, legal duties, regulatory oversight,

²⁷ For investment, such requirement has been acknowledged by section 19(1)(b) of the 2024 act (except for s19(3), under which is unclear whether unanimous agreement by trustees can still be negligent), but with charitable trust purposes, the scope will be broader than solely investment activity

²⁸ OSCR, *Charity trustee duties*, “Guidance and good practice for charity trustees” (02.04.2025, updated 25.07.2026) <https://www.oscr.org.uk/managing-a-charity/managing-charity-trustees/guidance-and-good-practice-for-charity-trustees/charity-trustee-duties/>, accessed 03 July 2026, p 5

²⁹ The *Scottish Law Commission*, “Report on Trust Law” (2014), Paper No 239 does not discuss section 19(3) in much detail, only highlighting that it is circumstantial at page 306

and serious consequences for people who rely on the charity. The question at hand therefore returns in a slightly different form. Should the role of charity trustee attract a special professional standard, even if the trustee is not a professional?

Section 66 of the 2005 Act is the starting point for this, considering the charitable trust's overlap into charity law. This section clearly sets out what is expected from trustees: they must act in the interests of the charity, work in good faith to ensure the charity follows its purposes, use the care and diligence reasonably expected of someone managing another's affairs, and appropriately handle conflicts of interest. The 2024 Act's s31(1) general duty of a trustee echoes the 2005 Act's s66(1)(b) duty, by also stating the trustee's obligation to exercise care and diligence that a person of ordinary prudence would exercise in managing another's affairs.

By comparison, a private trustee who neglects asset supervision, allows a conflict to sway decisions, or overlooks serious financial warnings may equally be in breach of trust. The charitable setting is only unique because the charity trustee is dually subject to the duties in s66 of the 2005 Act and s31 of the 2024 Act. A failure on the part of the trustee may therefore raise not only an ordinary question of breach of trust and personal liability, but also misconduct in the administration of the charity under section 66(4), with the possibility of regulatory inquiry and corrective action directed towards protecting charity property and its proper future application (see s66(1)-(4) of the 2005 Act). The relevant question is therefore not whether OSCR happens to identify failures before loss occurs, since the trustee's duty exists regardless of regulatory attention, but how the regulatory structure makes breaches of care, purpose and governance more visible and capable of correction than they may be in an ordinary private trust standing.

The professional standard of performance provisions in subsections 31(2), (3), and (4)(b) of the 2024 Act continue this train of thought. A professional trustee acting in the course of business and for remuneration is subject to the skill, care, and diligence reasonably expected of the profession concerned. A qualified individual who has been expressly instructed to provide professional services or advice is similarly held to the professional standard in performing that specified function. But a person who possesses professional qualifications, without so being instructed to use them, remains subject to ordinary prudence.

The professional standard has been contained within specific parameters to avoid grey areas, rightfully so considering the legal discussions, whether by the Scottish Law Commission or by courts, that came before the 2024 Act.³⁰ However, a counterargument remains. The statutory limits on professionalisation do not entirely resolve what should follow when a trustee undertakes a particular function because of relevant skill, experience, or claimed competence. Older commentary resisted a higher standard for corporate or professional trustees, discussing the English first-instance decision in *Bartlett v Barclays Bank Trust Co (No 1)*, as from the

³⁰ *Hunter v Hanley* 1995 SC 200; *Pitt v Holt* [2010] EWHC 45 (Ch); and n28 (the SLC 2014 Report) para 12.9, 12.12, 12.20, 12.31, 12.35, 12.37

beneficiary's perspective, the trustee's professional or non-professional status is fortuitous and should not alter the protection afforded by the standard of care.³¹ Such an objection to a rule that raises the standard is less persuasive where a trustee has accepted a defined specialist function or has been selected for it because of the competence they bring to the office.

Another, more creative, analogy can be drawn from *Macintosh v Nelson*. It is not, in fact, a trust law case, but rather a contract law case concerned with defective building work. Its relevance is therefore illustrative for our purposes. According to the Sheriff Principal, unless it was disclosed that the required ability was lacking, a person who took on work and claimed to be able to finish it to a sound workmanlike standard could not thereafter rely on his amateur status.³² This suggests that a trustee who accepts, claims, or is allocated a role requiring particular competence may be expected either to perform that role with the expertise represented or to recognise the limits of their competence and seek advice or assistance. The analogy is similar to the idea of fairness in personal-bar reasoning: if someone leads others to rely on their claimed skills, they cannot later say those skills were missing.³³ But the trustee question is whether the way the trustee board assigns responsibility, and the trustee's accepted role, makes it reasonable to expect particular care, advice, or disclosure when running the trust.³⁴

It is clear that charity trustees cannot be grouped within the statutory professional category solely because they are charity trustees. The baseline ordinary prudence standard can, however, be displaced by a more demanding standard where the undertaking actually accepted makes it out to be a more complex role for which they have relevant professional skills. A trustee appointed as treasurer because of accountancy experience, asked to lead a major property transaction, or given responsibility for specialist safeguarding or investment oversight may have assumed more than the ordinary, non-specialist board role. The law does not necessarily expect them to do all technical work themselves because of it.

³¹ "In English first instance decision of *Bartlett v Barclays Bank Trust Co.* (No. 1) [1980] 1 All ER 139, the judge stated obiter that a corporate trustee carrying on a specialised business of trust management, which holds itself out as being skilled as a trustee, will be subject to a higher standard of care and diligence than a non-corporate trustee... It is suggested that the approach in *Bartlett* ought to be resisted. The standard of care required is designed to protect the beneficiaries and from their point of view it is wholly fortuitous whether or not the trustee is corporate or non-corporate, professional or non-professional." (page 141 of K Norrie and E Scobbie, *Trusts*, 1991).

³² *Macintosh v Nelson* 1984 SLT (Sh Ct) 82, p 2 per Sheriff Principal Gimson, who in his reasoning quoted the case of *Brett v Williamson* 1980 SLT (Sh Ct) 56

³³ "The two main pillars of personal bar are inconsistent conduct and the unfairness which would ensue for a party who has relied on the conduct of the estoppel denier and has altered his legal position accordingly to his prejudice, if the other party is not be barred from exercising that right." Edinburgh Law Review (2007), Vol. 11, Issue 3, at p 452

³⁴ Compare *Wilsher v Essex Area Health Authority* [1987] QB 730, 750G-751C, where Mustill LJ, in the context of English medical negligence, rejected a standard reduced solely by the individual practitioner's inexperience and preferred one related to the post occupied. The case is not authority on Scots trust law. Its limited value here is analogical: it helps explain why the responsibility actually undertaken may inform what reasonable care requires, without making every charity trustee subject to a professional standard.

The expectation that a trustee should either have self-represented competence or recognise its limits has both general and charity-specific aspects. The general aspect is that a trustee who takes on a specialist role must administer it prudently and may still need to obtain appropriate advice in certain circumstances. The charity-specific aspect is that section 66, OSCR's governance guidance and the public-benefit nature of the office make the board's distribution of skills, advice and oversight quite important. The following sections will therefore look into delegation, immunity, and practical governance.

6. Responsible delegation, honest error and the limits of liability

A contextual approach must also take into account the boundaries of personal liability. The concern with imposing a distinct and higher standard is not about excusing charity trustees on the basis that their role is community-serving, but about the risk that an unrealistically or excessively demanding standard could deter suitable candidates for the office and, ultimately, endanger the very charitable goals it aims to safeguard. We have seen Scots law often be concerned with overburdening the office of trusteeship, not wanting to shrink the pool of willing individuals to take on the role in an honourable and selfless manner, and not wanting to foster a culture of defensive decision-making instead of thoughtful, responsible and authentically caring leadership.

Some insightful examples derived from SLC papers and reports:

- a) Specific to immunity clauses, it has been suggested that denying “generous immunity clauses” could result in professional trustees becoming unwilling to act.³⁵
- b) Specific to ex officio trusteeship, the use of such change of office ruling may lead to some holders feeling that the duties suddenly imposed on them are “unduly burdensome” in addition to the other duties they hold at the time.³⁶
- c) The Law Society thought that those acting as professionals being expected to use their expertise whilst holding trusteeship would cause fewer people to want “to take on the burden” of being a trustee “unless obligations were kept to reasonable levels”.³⁷
- d) Yet there are limits as to how generous we can be on charity trustees, as the SLC discussed how a private trustee's knowledge may very well be so valuable that it justifies them keeping their office even after bankruptcy, yet “more stringent requirements are appropriate for charitable trusts” and so bankruptcy would render such trustee unable to maintain their office.³⁸
- e) Courts have also generally avoided intervening in how trustees use their discretionary powers within charitable trusts. For example, in *Re Devlin's Estate* (1889) 23 LR Ir 516, the Chancery Court only required a charity trustee to submit an affidavit

³⁵ n28, para 12.35

³⁶ n28, para 4.34

³⁷ n28, para 12.12

³⁸ *Scottish Law Commission*, “Discussion Paper on Trustees and Trust Administration” (2004), Discussion Paper No 126, para 4.44

explaining how he intended to exercise his discretion before releasing charity funds from the court.³⁹

It is now helpful to illustrate, mostly for the sake of readers' revision, the difference between an *ultra vires* and an *intra vires* breach. Simply put, an *ultra vires* breach occurs where trustees act outside of the trust's purposes or powers, while an *intra vires* breach occurs where trustees have acted within their powers but have executed their act carelessly, improperly, or dishonestly: all in all, negligently. While the first may establish that a trustee acted without proper authority to do so, it does not automatically indicate what personal remedy is appropriate in every charitable trust case. Other facts of the case, such as whether the trustee was at fault or if it was done in good faith unknowingly, whether it caused any loss, or whether the charity inadvertently ended up benefiting, and what is best for the charity's future, still need to be considered.

In *Andrews & Co v Ewart's Trustees*, the House of Lords held that the trust was public and charitable, that the trustees had acted in good faith, and that the conflicting directions in the deeds were material to the outcome.⁴⁰ Lord Watson adopted Lord Eldon's established distinction: courts deal strictly with wilful misapplication but do not impose personal punishment for an honest mistake in difficult charity administration, because that would deter prudent persons from trusteeship. Lord Watson then held that the trustees' error was an honest mistake as to the method of attaining the settlor's purpose and that the public interest had not suffered the relevant harm. The Lord Chancellor adds the important limiting passage for the paper: the trustees should have sought the court's scheme or directions if the founder's main purpose could not be efficiently accomplished without departure from the deed. Their honesty prevented personal liability on the facts, but it did not make their unilateral departure the ideal course.

The lesson we can draw from *Andrews* is that the court drew a line between a mistake made in good faith, in pursuing the charitable aim, and a careless neglect of trustee duties. When trustees face truly challenging or conflicting choices, it is reasonable to say that they cannot guarantee that no mistakes shall happen; they may act prudently, yet with a combination of circumstances, the result is not as successful as intended. It goes to show how case-by-case charitable trust law is and why, regardless of what statutes instruct, it is a field that engages frequently and specifically with the common law, and the courts. Yet as we see once more, honesty and good faith do not forgive a situation where a trustee should have known they were at the edge of their own reasonable judgement and should have sought advice from the court, other trustees, or those more experienced in the area at hand.

The same distinction appears in *Free Church of Scotland v MacKnight's Trustees*, where the court held that neither the testamentary trustees nor their law agents could be held personally liable for a

³⁹ n37, page 103

⁴⁰ n2, for the following discussion of the case please see p 73 for Lord Watson and pp 76-77 for the Lord Chancellor

failure to reclaim tax in the absence of a relevant averment that the entitlement was well known in the profession or claimed as a matter of ordinary practice.⁴¹ The case is not authority for passive delegation but instead sets out responsible delegation: the Lord President reasoned that the trustees had employed reputable law-agents and factors to manage the relevant business, and that the then-existing Scottish authority complicated the legal issue. But the reasonableness of relying on such information depends on the issue's content, the agent's competence, the facts available at the time, and whether there were noticeable warning signs that indicated further knowledge was required. The judgment also relies on the absence of any indication from the auditors that the repayment should have been sought.

This is especially important for small charities. A small local charity cannot be expected to reproduce the compliance procedures of a large charity that expands beyond the township or even national scale. Small charitable trust trustees are often unpaid and perform most of the operational work, not just the administrative tasks. But regardless of size and voluntariness, a trustee board may still find themselves lacking in expertise for certain matters, and just because they may have fewer resources, it does not mean they can skip the due process of seeking the appropriate information or guidance to fulfil the trust's smooth running. Good governance is placed upon every charity trustee; training, expert insight, potentially adding trustees or declining to undertake a task that cannot be assuredly performed to standard.⁴²

Overall, this paper holds that, at this point, the law should protect trustees from liability when they exercise reasonable judgment in a determinately difficult situation. It should not protect a trustee who asks no questions, seeks no information, fails to supervise the person entrusted with control of assets, and brings up volunteer status only after risk has materialised. The relevant contrast to make is between responsible stewardship and abdication of responsibility. In summary, an ultra vires act may depart from the purposes for which charitable property is held, but *Andrews* shows that an honest departure made in pursuit of the charity's purposes need not be treated in the same way as a self-interested or destructive misapplication. That said, an intra vires exercise of power may still give rise to serious liability where trustees fail to make proper enquiries or otherwise abdicate their responsibility, as *Rae*, *Tibbert* and *Lutea* illustrate.

7. Immunity clauses, gross negligence, and the non-delegable minimum of stewardship

We will now turn to immunity clauses as they uncover an important and albeit niche aspect of trust law. The standard of care and the remedy for breach are related: even when a trustee is bound by their duty of care, an immunity clause can shield them from liability for defined errors or

⁴¹ *Free Church of Scotland v MacKnight's Trustees* 1916 SC 349, pp 4-5 per Lord President

⁴² OSCR advises on good governance; see their website page on it <https://www.oscr.org.uk/managing-a-charity/managing-charity-trustees/guidance-and-good-practice-for-charity-trustees/introduction/> and we shall also go into this in more detail later on

omissions. Such clauses provide practical protection for trustees and matter in theory just as much. Now, if every breach is forgiven, that jeopardises the legal standard of care set upon trustees. Yet it must also be acknowledged that, by the court's hand, trustees can still be held to high enough expectations without being liable for every lapse in judgement.

The following Scottish cases show that an immunity clause does not empower a trustee to risk the estate or neglect their duties:

The foundational case for this area of law is *Seton v Dawson*, where one trustee took control of the trust money and solely managed the trust, while the other trustees let this continue for over eight years without meeting, checking accounts, or taking steps to ensure the funds were being safely handled. When the managing trustee went bankrupt, the court held that the immunity clause did not protect the trustees from personal liability because they had acted in total disregard, which amounted to *culpa lata*.⁴³ The judges actually differed on whether the trustees who signed the deeds had actually intermeddled with the funds themselves. So what we can take away from this as authority is the limit it places upon delegation: how trustees can delegate functions onto co-trustees or others, but they must retain sufficient oversight by staying informed, auditing their work, and ensuring the trust is protected. It would be clearly unreasonable for a trustee to accept office and then stand wholly aloof, watching the estate be left to wither away. In *Seton*, the trust funds were still under trustee control, not an agent's control, when they failed to prudently collaborate in how the trust was administered.

Next, in *Lutea*, Second Division considered a loan of \$914,000 (USD) to an individual, repayable in a matter of weeks, with an extraordinarily high return, secured only by what would be worthless shares. The defenders did not explain the loan, the borrower's creditworthiness, the security's valuation, or why the transaction served the trust's purposes.⁴⁴ Lord McCluskey treated the admitted circumstances and failure to account as sufficient to infer gross negligence; and further, the court held that the immunity clause indeed did not protect against *culpa lata*. The key reasoning we should focus on is the statement that, whatever powers the trust deed conferred, trustees' primary duty was to preserve, or at the very least not endanger, the estate whilst under their management.

Now the case of *Lutea* was to do with a highly unusual lending transaction and professional trustees, so it does not necessarily create a direct rule that professionals owe a different standard from gratuitous trustees. Indeed, the court did not decide on that issue as the trustees' actions were clearly grossly deficient regardless of their professional status. the question this case puts forth for us to ask when considering trust situations is not whether the outcome was poor, but whether the

⁴³ *Seton v Dawson* (1841) 4 D 310, p 317-318

⁴⁴ For the following discussion of *Lutea*, please refer to the following citation) n15, pp 741, 743, 745 as per Lord McCluskey and pp 737-338 as per Lord Justice Clerk

trustees exposed the trust estate to unnecessary risk, and whether they can explain why they had thought, at the time, their decision was reasonable.

We will consider this a suitable premise for the charitable trustee argument, as it shows that we don't need to set a completely new, higher standard for gross negligence. There's no need for a special rule specific to charities when it comes to serious issues such as failing to keep proper accounts, failing to protect assets, or failing to notice obvious warning signs. What's different when it comes to charitable trusts, and charity law as a whole, is that failures can harm the public, who often can't spot problems needing addressing, nor fix them through their own actions, so taking precautions earlier is the fitting way to prevent failure.

The legislative policy behind section 31(4) of the 2024 Act is worth a moment's consideration because the SLC sought to preserve wide administrative powers for trustees whilst also protecting untrained or gratuitous trustees. They also saw it as important to prevent trust deeds from lowering the standards of care and diligence.⁴⁵ The SLC made it clear that gross negligence is simply not acceptable for anyone in any trustee role, and professional trustees who are chosen for the trusteeship because of their expertise should not, once again, be able to avoid liability because of an immunity clause, pointing out how such professionals should also be more easily capable of obtaining insurance for themselves. In the end, trustees are not expected to do the bare minimum; they indeed have a lot resting on their shoulders, especially professionals, but the law is not overly harsh and acknowledges that honest mistakes are made and what matters is only that those who negligently, recklessly, or carelessly "mess up" are held to own up and help to fix any negative results.

8. OSCR and the institutionalisation of prudent governance

The OSCR is a regulatory body that oversees charity activity to ensure statutory rules are followed and practices are carried out soundly. Their guidance is central to the practical meaning of charity trusteeship, as they offer advice which acts preventively to steer trustees away from misconduct by setting out certain standards that should be in place within the general charity.⁴⁶ Its guidance presents trusteeship as collective. It explains that trustees share responsibility for compliance, that no trustee may simply leave financial understanding to a treasurer, and that boards should have the skills and experience needed as a group. It also advises trustees to identify skills gaps, provide induction, review training needs, maintain financial controls and obtain professional advice where required. These are not merely administrative recommendations. They describe the kinds of

⁴⁵ n28, the report says that gross negligence was regarded as fundamentally inconsistent with a trustee's fiduciary position (p 22 "we regard gross negligence as..."), and also explains that the Commission considered that professional trustees, appointed because they could provide a superior standard of service, should not ordinarily obtain protection from negligence claims through immunity clauses (p 135 "professional trustees are appointed...")

⁴⁶ duties under s66 of the 2005 Act; n41

institutional arrangements through which a board may demonstrate that it has acted with the care and diligence reasonably expected of persons managing another's affairs.⁴⁷

The reference to skills needed across the group of trustees does not mean that among the trustees there need to be lawyers, accountants, investment bankers, etc. Nor does it mean that because one trustee is a treasurer or possesses relevant expertise, the remaining trustees may remain uninformed. A charity board may divide labour and rely on anyone's relevant expertise, but they must remain capable of questioning, reviewing and, where necessary, challenging the information on which it acts. Going back to the logic of *Seton*, we now know delegation is a legitimate tool for trustees to use, but the act of giving away tasks so that one may need not worry about them anymore is not.

To illustrate this in a fun, creative way, we'll use the imaginary example of a small, independently run coffee shop. Let's say the owner of this shop cannot afford to hire an experienced barista and may therefore appoint someone with limited experience but sufficient maturity, capacity to learn, and willingness to be trained. That does not remove the risk involved in entrusting that person with independent responsibility. The owner must recognise the limits of this person's experience and thence supply training, supervision and support before the person is expected to act alone. If the owner ignores an obvious capability gap, foreseeable loss may include not only immediate financial loss but damage to the shop's reputation, suppliers and community relationships. Now don't worry, the analogy is not that a charity is a coffee shop, nor that a trustee can be classified as an employee. It is that a charity may properly rely on trustees who are not specialists or experts, but it cannot ignore the capability required by the responsibilities they undertake. A volunteer trustee need not arrive with professional expertise, yet where the charity begins contracting, takes on substantial financial obligations, transacts with the trust's assets, or provides services and aid to vulnerable recipients, the governing body must ensure it has trustees who can understand the task, ask questions preventatively even if they are confident in their actions already, recognise when support is needed, and obtain it.

The psychological and sociological character of trusteeship can also help to explain why that capacity cannot be assumed. Although not Scottish-focused, the Charity Commission for England and Wales published a report in April 2025 noting that many trustees are new to the role, particularly in micro and small charities, and that experienced trustees are somewhat more likely than first-time trustees to feel their contributions are respected in board meetings.⁴⁸ Experience may therefore affect not only technical knowledge but a trustee's willingness to speak, challenge

⁴⁷ n41, see introduction and section on charity trustees' duties; OSCR Guidance on recruiting charity trustees, <https://www.oscr.org.uk/managing-a-charity/managing-charity-trustees/recruiting-charity-trustees/>

⁴⁸ Charity Commission for England and Wales, *Trusteeship – a positive opportunity: understanding skills, experience and demographics in England and Wales*, pp 10, 15 <https://www.gov.uk/government/publications/charity-commission-research-into-trusteeship-and-the-trustee-population/trusteeship-a-positive-opportunity-understanding-skills-experience-and-demographics-in-england-and-wales>

and participate effectively in collective decisions. Now, having good intentions does not mean a trustee will make wiser choices, and being a professional doesn't always equal thinking independently, but the research done on board governance goes to show that details like having a strong belief in the charity's mission, cognitive diversity, the individual pressures trustees face, and the risks associated with group thinking all affect trustees' decision-making and its outcomes.⁴⁹ The legal relevance of this lies in the need for systems to address these common vulnerabilities. For example, trustees who have little time to prepare may rely on a member who seems most knowledgeable, and an overly united board may ignore warnings or avoid questioning assumptions.⁵⁰ This is why implementations like induction, clear roles, challenging propositions, record-keeping, reviewing skills, and seeking independent advice matter so much. They are additions to the standard of care, amplifying what ordinary prudence means in charitable practice.

OSCR describes financial controls as systems designed to protect a charity's assets and encourage informed decisions about its financial position. It recommends segregating duties where possible, keeping clear procedures, maintaining up-to-date records and reviewing them regularly. So, if all of a sudden the OSCR becomes aware that trust assets have gone missing, conflicts have been concealed, or warning signs have been ignored, whether the recommended safeguards were in place could be the evidence to prove misconduct.⁵¹

The 2005 Act gives the OSCR powers stronger than guidance alone. Under section 28, OSCR may make inquiries at any time, either generally or for particular purposes, and may do so on its own initiative or following a representation by any person. Concerns may therefore arise from information supplied by the public, from reported accounts and annual returns, or from other information available to the regulator. Where an inquiry reveals misconduct in the administration of a charity, or where action is necessary or desirable to protect charity property or secure its proper application, section 30B permits the OSCR to direct the trustees to take specified steps. The Court of Session retains a more extensive protective jurisdiction under section 34, which is engaged on application by the OSCR and includes misconduct or situations where intervention is necessary to protect charitable property. An OSCR inquiry involving Court of Session powers concerned the Jericho Benedictine Society.⁵² The lack of financial control by the charity's three trustees led to the trust struggling and it being highly possible for it to be unable to meet its financial obligations such as debts, upcoming expenses and staff cost. The OSCR observed that: "The charity trustees had a poor understanding of their duties and little insight into the charity's financial situation or the action that was required to save the charity from financial collapse." This

⁴⁹ Charity Excellence Framework, March 2025, *Examining the role of intrinsic and extrinsic motivation in charity board governance*, University of Bath, pp 9, 107 <https://www.bath.ac.uk/announcements/charity-board-effectiveness-why-trustee-motives-matter-more-than-cvs/>

⁵⁰ n48, pp 106-108

⁵¹ n41, see section on Charity Finances

⁵² OSCR, Inquiry Report made under Section 33 of the Charities and Trustee Investment (Scotland) Act 2005, The Jericho Benedictine Society, SC016909 (08/05/2025) <https://www.oscr.org.uk/media/jbajuvuo/s33-inquiry-report-re-jericho-benedictine-society.pdf>, accessed 26/03/2026

is where the OSCR applied to the Court of Session for the appointment of an Interim Judicial Factor to protect any income (from the sale of some of the charity's property) and vulnerable beneficiaries currently dependent on the charity. This securely protected the trust, and the Court of Session subsequently made the position permanent two months after the initial appointment; Jericho serves as a useful example of how intervention saves charity property and vulnerable beneficiaries from irrecoverable governance failures.

The reason why this paper lays so much emphasis on OSCR guidance is because of its power to spot and correct governance missteps before they can do permanent damage to charities or their beneficiaries. This hands-on, preventive approach ties back to our observation of *Andrews'* precedent: modern-day charity does not have to choose between demanding professional standards from every trustee and accepting unchecked risk. Instead, it can insist on detailed trusteeship guidelines, the habit of seeking advice routinely, transparency to regulators and the public, and early intervention, while treating trustees fairly when they have acted with honesty and care. As the OSCR states, its response to trustee actions depends on the circumstances the trust finds itself in, and formal action against trustees is unlikely when there has been reasonable and honest conduct.⁵³ In effect, prudence in charities becomes less about assigning blame after loss, and more about setting a soundboard for upholding enduring, thoughtful stewardship.

9. Purpose, truster intention, and prudent adaptation

When considering the ordinary standard of care, it is important to not overlook the truster's original intention. Charity trustees are responsible for property according to the purposes set out in the trust deed and within the limits of charity law. Factors like public opinion, the trust's reputation, new social needs, or a trustee's personal beliefs about what is best for the trust or public do not, by themselves, allow the trustees to change those purposes. This is where charity's purposes and the standard of care come together:

If a trustee follows outdated procedures without question, they might fail to notice a need to seek advice or to reorganise by contacting the OSCR or applying to the court (see section 16 of the 2005 Act). On the other hand, a trustee who sees every difficulty that arises in administration as reason to go around the truster's instructions is also failing, failing in a legally breaching way. Prudence means knowing the difference between carrying out the trust's purposes as intended or lawfully making changes, and making changes on their own judgement that go beyond their authority, in turn committing misconduct.

Being a charity trustee means acting as a careful steward of the charity's purposes. Trustees should be able to identify the charity's legal goals, separate them from their own preferences, and seek out advice when the trust's purposes or their powers are unclear. In a private trust, beneficiaries can

⁵³ n41

agree to or request changes to the trust (its purposes, trustees' duties, or termination of the trust) under section 58 of the 2024 Act, which does not apply to public trusts. However, in a charity, because the purpose serves the public, trustees cannot simply get consent from those affected.⁵⁴ This makes it especially consequential to make use of lawful procedures for making changes, including regulatory and court oversight when needed.

10. Investment as an illustration of contextual ordinary prudence

A charity may therefore face investment questions in which considerations beyond financial return have particular significance, such as whether an investment is consistent with its charitable purposes, risks alienating supporters, or could undermine public confidence in the charity.

Section 20 of the 2024 Act, once in force, sets out that where two or more proposed investments are suitable for the trust, trustees may consider the appropriate non-financial factors, including how well an investment is consistent with the trust's purposes and ethical, social or environmental concerns. This section is not here to require trustees to avoid every controversial sector, especially since often one person's ethical deed is another's unethical one, nor is it to allow trustees to act upon their personal beliefs or goals; it exists because trustees should consider such factors when determining whether an investment is suitable.

The following English cases are useful as a comparative study. In *Harries v Church Commissioners for England*, the court treated financial return consistent with commercial prudence as the ordinary starting point, while recognising that a charity's investment policy may raise conflicts with its purposes or relationships.⁵⁵ More recently, *Butler-Sloss v Charity Commission for England and Wales* rejected an absolute or "mechanical" approach to purpose-related conflict. It treated the matter as one of trustee discretion exercised by balancing relevant considerations, including the seriousness of the potential conflict, likely financial effect, reputational consequences, available advice and the charity's overall purposes.⁵⁶ These cases demonstrate why the question should be whether trustees followed an appropriate decision-making process, rather than whether the eventual investment was morally or socially acceptable. The legally relevant point here is whether trustees identify the charity's purposes, gather enough

⁵⁴ Section 56 of the 2004 act allows changes only when "the charity's purposes have been fulfilled as far as possible, can no longer be given effect to, are no longer charitable purposes, no longer provide an effective means of using its property or that part of the charity's constitution is no longer desirable. In addition, OSCR must be satisfied that the reorganisation will allow the charity's resources to be better used for its charitable purposes."

⁵⁵ *Harries v Church Commissioners for England* (1992) 1 WLR 1241, 1246A-B, 1246D-E

⁵⁶ *Butler-Sloss v Charity Commission for England and Wales* (2022) WEHC 974 (Ch), para 68-78, Green J rejected a schematic or prescriptive ordering of the *Harries* categories and rejected an absolute prohibition on directly conflicting investments. He held that trustees retain discretion in potential conflict cases, exercised consistently with the overarching duty to further the trust's purposes and summarised the resulting approach: trustees reasonably balance relevant factors, including the seriousness of a possible conflict and the financial effect of excluding the investment; they may take account of donor support and reputation; and they must act honestly, reasonably, with due care and skill, and responsibly.

information, can tell the difference between purpose-related concerns and personal moral views, weigh financial and operational consequences, and take record of their well-reasoned conclusion. A case closer to home, *Martin v City of Edinburgh District Council*, considered the investment of public and charitable funds held by a local authority in trust. Trustees had pursued divestment from companies connected with South Africa in line with an anti-apartheid policy. Yet they had not separately considered whether the policy was in the interests of trust beneficiaries, nor did they obtain professional advice on it, resulting in a clear breach of trust. The court recognised that the demand for trustees to abandon all moral, political or conscientious commitments whilst in their trusteeship would be unrealistic. Its main point instead was that trustees must exercise independent judgment of what trust issue is before them and cannot treat an antecedent political commitment as a substitute for considering beneficiaries' interests, relevant risks and necessary professional advice.⁵⁷ *Martin* therefore demonstrates that trustees can have legitimate concerns about whether an investment is consistent with the charity's purposes or whether it could potentially reduce confidence in the trust's work. Those concerns must become part of a properly informed decision about the charity's interests. The legal point we focus on is that trustees should not let personal beliefs take the place of sound judgement; where the situation is complex or where there is substantive risk, to act with the appropriate standard of care is to obtain the appropriate advice or knowledge.

The same approach applies beyond investment into areas such when trustees are making decisions to do with grants, contracts, safeguarding issues, selling property, or continuing a financially struggling service. Ordinary prudence therefore becomes more stringent because the circumstances in which they exercise their office may demand more careful and informed decision-making.

11. A framework for applying ordinary prudence to the charity trustee

Bell's portrayal of trusteeship as a troublesome and thankless office still remains important as this paper comes to a close. It acknowledges that trustees frequently shoulder responsibility for property and causes that are not their own, often without any "reward". Yet it still is indeed only the beginning of the story. A modern charity trustee may be part of a small volunteer board; equally, that trustee may participate in decisions about assets, contracts, information, beneficiaries and risks on which a public-benefit institution depends.

The analysis rejects two unsatisfactory lines of argument. First, there should be no creation of a new rule which sets out that all charity trustees have a professional standard of care applied to their trusteeship. Simply having charity status, being a volunteer, or even having professional

⁵⁷ *Martin v City of Edinburgh District Council*, 1988 SLT 329 ("What he must do, I think, is to recognise that he has those preferences, commitments or principles but nonetheless do his best to exercise fair and impartial judgment on the merits of the issue before him. If he realises that he cannot do that, then he should abstain from participating in deciding the issue (on the analogy of a disqualifying declared interest) or, in the extreme case, resign as a trustee." Per Lord Murray at p 6)

qualifications does not automatically trigger professional care; section 31 in particular identifies specific situations where the professional standard applies, and charity status is not one of them. Second, there is no direct case to justify a lower standard for volunteers. Cases like *Andrews* and *Free Church* have explained to us why it is important to consider how honest error, legal challenges, responsible delegation and avoiding the deterrence of suitable volunteers matter. However, on the other hand, *Seton* and *Lutea* have explained that the ordinary standard is already strict enough to handle situations where trustees surrender control, fail to supervise, put trust property at risk, or cannot account for unusual administrative decisions.

The more persuasive argument is that the law has moved beyond the traditional conception of trusteeship as a single fiduciary office, as now the charitable trustee has increasingly become an office of public governance, and the distinctive risks and responsibilities of that office are different to those found in private trusteeship. Legally, charity trustees should remain subject to the ordinary standard of care established, but it should be applied on a case-by-case basis with reference to the public-benefit office actually held. The charity's purposes, risks, assets, statutory and regulatory obligations, governance structure, beneficiaries' capacity to monitor, and the trustee's actual or assumed expertise are the circumstances used to assess whether trustees have acted with reasonable prudence according to their particular trust's, their charity's, needs.

Turning to the legislation, the main point of section 66 of the 2005 Act is to set care and diligence within a broader legal duty to run the charity in its best interests, to follow its purposes with absoluteness, to handle any and every conflict, and to obey the full extent of charity law. The nature of the role of charity trustee is one that directly works towards and is grounded in benefitting the public; combining that with the regulatory oversight and the absence of proprietary beneficiaries who maintain a supervisory ability, and we get more practical insight into what ordinary prudence looks like in a charitable trust setting. Charity-trustee exceptionalism lies in ensuring the office's missions provide positive effects on communities, individuals, and projects in need, maintain good guidance, and remain in a highly prudent manner when directing a trust in its activities.

The following framework offers a way to apply the existing common-law and statutory ordinary-prudence standard of care to decisions made by charity trustees. It is not attempting to introduce a new legal test as a checklist for every board decision; I, of course, do not have such authority to do so, nor do I think it necessary in this case. Instead, it is here to highlight the questions that are most likely to become relevant when assessing whether trustees have acted with reasonable care and diligence in the circumstances at hand. *Ex ante*, before making a decision, such questions can be of aid to trustees and help them figure out what information, advice, safeguards and processes they need to act upon before proceeding in their affairs. *Ex post*, after making a decision, they can be an aid to a court or regulator when deciding whether the trustees' conduct met the ordinary-prudence standard in the charity's circumstances.

- I. First off, what are the charity's legally defined purposes, main activities, assets and foreseeable risks?
- II. Who might be likely to be harmed if the decision goes wrong or does not produce the intended outcomes, and if those persons were to be harmed, can they protect or monitor their own interests?
- III. What responsibilities did the trustee actually accept? Did the trustee have relevant expertise, claim particular competence or to have certain skills, receive remuneration, or undertake a specialist role?
- IV. Did the board have access to the necessary skills, information and advice reasonably required? If not, did it take reasonable steps to obtain them?
- V. Were conflicts of interest identified and managed? Were material decisions supported with enough and applicable information, clear and correct records, proper controls and sound reasons?
- VI. Did trustees notice warning signs, and if so, proceed to ask questions, seek advice or direction where needed; did they correct any mistakes and protect the charity's purposes and assets?

These factors are not all required at once, and none of them alone will determine the outcome of administration. How important each factor is depends on the specific decision being considered. For example, a volunteer trustee within a small two-person trustee board making a routine expenditure decision will not need to complete the same amount of preventative cautionary steps as when handling a major investment or selling charity property. Nor the same amount if the trustees are making decisions which affect vulnerable people involved or are working towards ensuring any beneficiaries, staff, and volunteers are protected from harm, whether financial or not. The framework is therefore contextual in two ways: it asks what the charity needed and what responsibilities the trustee or board actually took on.

The questions allow the law to be exacting where public-benefit property is managed without meaningful oversight, while remaining generous where trustees act candidly, seek appropriate advice, preserve the charity's interests and respond responsibly to problems. Scotland may in future choose to consider a "context matters" principle by requiring trustees to show care proportionate to their charitable trust's, or in extension their charity's, individual situation. Although legal acknowledgement would be beneficial, at the very least this paper aims to commence a conversation among those in the industry, but it is not required for improvements to begin. When approached with a careful eye, the context of common law, parts of legislation like section 66 and the framework proposed under the 2024 Act, and regulatory oversight provide the elements we need for a more thoughtful, practical and exacting path to managing charitable property prudently.