The Expansion of Fiduciary Obligations: Stretch Goal or Over Reach

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My paper is based on what will almost certainly be one of the most significant cases that the Supreme Court will hear this year.

It involves the question of whether our Courts should expand the law concerning fiduciary relationships and fiduciary obligations.

There is an interesting background to this development. Between about 1989 and 2009 the Supreme Court of Canada began to expand the law concerning fiduciaries quite extensively. The Australians thought that the Canadians had gone much too far and they refused to follow the Canadian initiatives.

It is of interest to know that the Courts in the United States have gone further than the Canadians in expanding the law concerning fiduciaries.

The reasons why Canada chose to expand the law.

In *Norberg v Wynrib* [1992] 2 SCR 226 McLachlin J (as she then was) said that the doctrines of tort and contract do not *"capture the essential nature of the wrong done to the plaintiff"* and that *"[o]nly the principles applicable to fiduciary relationships and their breach encompass it in its totality …. [t]he foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest… The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other"*

A second reason why the Canadians expanded the law concerning fiduciaries is that the remedies available in contract and tort differ significantly in some respects from the remedies that are available in Equity and the remedies in Equity are seen as being more appropriate.

The catalyst for the debate in New Zealand was a case which some lawyers call *"the Alphabet case."* The plaintiffs were A, B and C (being the children of a violent father) and the defendants, D and E, are Trustees of a Trust. The case is now known as *D v A* [2022] NZCA 430

The facts of *D v A*

It was successfully argued in the High Court that:

- The father of two sons and a daughter abused them egregiously when they were children, thereby breaching fiduciary duties that he owed them at the time.

- The abuse had an enduring adverse impact on the children when they became adults.

- The father repeatedly raped and sexually abused his daughter when she was between seven – thirteen years of age. He also emotionally abused her during her childhood and teenage years.

- The father physically and emotionally abused his sons until they left home when they were about sixteen years of age.

- The father had virtually no contact with his children after they left home.

- By the time the daughter was eleven she made attempts to commit suicide. As she grew older, she suffered from profound depression, suicidal thoughts and lack of self-esteem. She began to live an impoverished and nomadic life.

- In 2017 she went overseas to try to get work and she returned to the country in 2020. After returning, she struggled to find accommodation. "She has been 'house-sitting' and staying with friends. Occasionally, she has been forced to live in her car. She has had no fixed abode or permanent work … [She] said she continues to live in poverty and that she suffers from poor health associated with post-traumatic stress disorder."

- The father used to beat one of the sons "repeatedly and sadistically with the buckle end of a belt for even the most minor things" and the son developed a tremor for which he was referred for medical care when he was about eleven or twelve. The father became most abusive after he had been drinking and he enjoyed humiliating the son in front of other people. The son left home in 1980 after a physical fight with his father in which for the first time he defended himself and punched his father in the face. The father told him to leave the house, which he did, and he never saw his father again. He was not successful at school and within a few months of leaving home he became involved in a dispute with gang members which left him with life threatening injuries. The father never went to see his son in hospital.

- The second son was traumatised by the father's violent behaviour to his wife. The abuse of her would normally occur when the husband returned home drunk. He would hit her and threaten to shoot her and the children. On one occasion he tried to pull his wife's fingernails out and he gave her tablets which led to an overdose but refused to take her to hospital – presumably in the hope that she would die. Following the separation, the husband would sometimes stand outside the house and point a gun at the house knowing that the wife, a son and the daughter were inside and he would make threatening phone calls during the night. Both sons described how they witnessed their father inflicting physical and emotional abuse on their mother.

- The second son has suffered serious depression and struggled to maintain meaningful relationships, which he attributes to the violence and emotional torment inflicted by his father.

Although the Accident Compensation Act has prevented most claims for monetary relief for injuries, it has not done so for claims that involve exemplary damages.

Our current law allows plaintiffs to sue for exemplary damages arising from physical and mental injuries.[1]

The three Judges in the Court of Appeal accepted that the father owed a fiduciary duty not to physically and sexually abuse his children. Gilbert J's acceptance of this was qualified by saying that there had been no challenge to the trial Judge's finding that there was a fiduciary relationship between the father and the children and that he owed them a fiduciary duty not to physically or sexually abuse them. He said:

> *"I make no comment on whether this is a correct statement of the law in New Zealand. I simply note that no such fiduciary relationship or fiduciary duty has been recognised in Australia or in England.*"[2]

The difficulty in the *D v A* case was that the father had no assets of significance when he died so that any claim had to relate to his actions in disposing of almost all his assets before he died so as to prevent the three children from being able to make a claim against the assets. This was difficult since the father's actions in disposing of his assets took place about 30 years after the children had left home and two of the three Judges held that there was no fiduciary obligation on a father to refrain from disposing of his assets long after the children had left home.

The novelty of the Court of Appeal's decision is that two of the three Judges have accepted that parents owe fiduciary duties to their children.

Justice Kos says that the duty ends when the father no longer lives with or cares for the child.[3]

Justice Collins held that a parent can owe an ongoing fiduciary obligation to a child long after he or she has left home.

He said:

> *"It is my view… that in some circumstances, the inherently fiduciary relationship between a parent and a child may continue after a child becomes an adult. For example, it could not be disputed that a severely disabled child who is dependent upon their parents for care and support as a child may continue to be the beneficiary of an inherently fiduciary relationship after the child becomes an adult."*[4]

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1 See *Couch v Attorney-General* No. 2 [2010] NZSC 27, [2010] 3 NZLR 149.

2 Paragraph [136].

3 And his reference to a *"child"* is to a child who is less than 20 years of age.

4 Para 79

By that reasoning, Collins J was able to find that actions that the father took shortly before he died when he transferred most of his assets to a Trust to thwart any attempts by his children to make a claim under the Family Protection Act were a breach of fiduciary duty.

The Supreme Court has agreed to hear an appeal from the Court of Appeal's decision and, being aware of the significance of the case, it has appointed an Amicus to assist it.

Justice Kos who sat on the appeal in the *D v A* said extra-judicially in 2021:

> "*The types and forms of private relationships recognised as fiduciary are likely to grow as equity faces up to a changing New Zealand. The types of relationships recognised as fiduciary may also grow.*"[5]

I wrote two of articles about the *D v A* in which I said that I disagreed with the Court of Appeal's decision. Andrew Steele wrote a subsequent article in which he expressed the opposite opinion and the organising Committee for the Cradle to Grave Conference thought it might be interesting to have a session in which the opposing arguments and discussed.

Critics of the expansion of fiduciary law appear to be primarily concerned about the vagueness of the fiduciary concept. A former Chief Justice of the Australian High Court, Sir Anthony Mason was highly critical of fiduciary law, saying:

> *"the fiduciary relationship is a concept in search of a principle."* [6]

Professor Rotman, the Canadian author of the 823-page text "Fiduciary Law", has said that whereas Sir Anthony Mason had said that "*the fiduciary relationship is a concept in search of a principle*" the term "*fiduciary is not a concept in search of a principle, but a vibrant and existing facet of law whose potential is only beginning to be tapped.*" He said the fiduciary concept is to be regarded as a concept in need of understanding.

There is no doubt that the fiduciary concept is poorly defined. A number of terms have been used to describe it such as:

> "*aberrant, amorphous, elusive, ill-defined, indefinite, vague, peripatetic".*

Professor Peter Birks has described the concept as "*a blot on our law and a taxonomic nightmare.*" [7]

Even the Canadian Judges acknowledge the uncertainty of the law. La Forest J of the Supreme Court of Canada said in *International Corona Resources Limited v Lac*

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5 In a paper entitled "*This May Seem Hard: Temporal and Personal Perspectives on Fiduciary Law"* delivered at the NZ STEP conference in 2021, paragraph 65.

6 "Themes and Prospects" in P D Finn ed "Essays in Equity" 1985

7. P. Birks "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 W. Aust. Law Review 1 at 3

Minerals Limited[8] that:

> "*There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.*"

Notwithstanding the uncertainty about fiduciary law, Professor Rotman has summarised the popularity of the fiduciary concept in these words:

> "*The legal community remains fascinated with this uniquely flexible and powerful tool. Judges regard the fiduciary concept as a vehicle which enables them to apply and enforce important obligations between parties in certain socially or economically necessary or important relationships. Lawyers, meanwhile, view it as a medium that grants them access to a broad range of desirable relief while avoiding impediments imposed by other areas of law. For these reasons, the fiduciary concept has been applied to a wide variety of relationships and circumstances with no discernible end in sight.*"[9]

Some Canadian cases concerning the fiduciary concept

I next refer to some situations where the Canadian Courts have either applied the fiduciary concept or given serious consideration to its application.

Duties owed by a parent to a child

In *M (K) v M (H)* (1992) [10]the Supreme Court of Canada held that a father's fiduciary duties towards a child are breached when he "*subjects her to incestuous acts.*"[11] In the same decision it was said that "*the inherent purpose of the family relationship imposes certain obligations on a parent to act in the child's best interests, and a presumption of fiduciary obligation arises.*"[12]

The father's actions against his daughter could presumably have been the subject of a claim in tort but in my opinion, a claim of breach of fiduciary duty was a more appropriate cause of action for the facts of that case.

The High Court of New Zealand and the Court of Appeal have referred to this case in *D v A.*

Re Norberg v Wynrib*[13] (1992*)

In this case, a male doctor who became aware of a female patient's drug addiction, prescribed drugs for her in exchange for sexual favours. Justice McLachlin said:

> "*To look at the events which occurred over the course of the relationship between Dr Wynrib and Ms Norberg from the*

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8 (1989) at 61 DLR (4th) 14 SCC at 26. [R 17]
9 "Fiduciary Law" Thomson/Carswell 2025 page 2
10 [1992] 3 SCR 6
11 (1992) 96 DLR (4th) 289 (SCC) 4 [1992] 3 SCR 6 at 61-62.
12 "Fiduciary Law" page 318.
13 (1992) 92 DLR (4th) 449 (SCC).

> *perspective of tort or contract is to view that relationship through lenses which distort more than they bring into focus. Only the principles applicable to fiduciary relationships and their breach encompass it in its totality.*"[14]

To try to construct a cause of action in tort or contract for the doctor's conduct is problematic. The facts of the case fit much more readily into a claim of a breach of fiduciary duty.

Szarfer v Chodos*[15](1986*)

In this case the plaintiff in the context of legal proceedings confided to his lawyer that he was having marital problems from (among other things) his sexual impotence. The lawyer proceeded to initiate an adulterous affair with the client's wife. The client was awarded damages of C$43,663 in respect of the lawyer's breach of his fiduciary obligations.

In ***Hodgkinson v Simms*** [1994] 3 SCR 377 the Supreme Court held that it was a breach of fiduciary duty for an accountant not to disclose when he recommended to a client that he should invest in some real estate that he (the accountant) would receive a financial reward from the developer of the real estate for arranging for the client to make the investment. A consequence of the ruling that the accountant owed a fiduciary obligation to the client was that the client was entitled to be fully indemnified for his losses, a relief that was greater than could have been obtained in a claim for breach of contract.

The *Lastman* litigation

Mel Lastman, the Mayor of Toronto, was sued for breach of a fiduciary relationship in respect of an affair that he had with a woman. It was alleged that the Mayor's *"participation in the act of procreation*" created a fiduciary relationship from which duties flowed to the children who were born as a result of the affair.[16] The claim that there was a fiduciary relationship between Mr Lastman and the woman was rejected by the Court.

In a separate proceeding the mother of the two children claimed that the Mayor had breached his fiduciary duty to support the children financially. This claim also failed on the grounds that it was an attempt to circumvent the child support legislation.

The *Lastman* cases also led to the possibility that grandparents may owe a fiduciary duty to provide financial support for their children. This was argued in *Fein v Fein*[17] where a mother made a claim on behalf of her two daughters against her in-laws for breach of fiduciary duty stemming from their failure to adequately support the family's formerly lavish lifestyle upon the separation of the children's parents. The mother alleged that the grandparents had effectively underwritten the family's affluent lifestyle which included paying for groceries, petrol, clothing, a house, holidays, and providing

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14 Ibid page 484.
15 (1986) 54 OR (2d) 663.
16 Louie v Lastman (No1) 54 OF(3d) 286
17 (2001) 21 RFL (5th) 24 (Ont SCJ).

the mother with a $300 per week allowance etc. All of this support was withdrawn when the son and daughter-in-law separated. The Judge said that the claim arose from a "*withdrawal of largesse*".

The grandparents' motion was successful in part. The Judge allowed the claim for breach of fiduciary duty to proceed to trial. Although the Judge found that the claim was novel, he indicated that it was not plain and obvious that it had no chance of success.

> "*I do not think that the developing law governing fiduciary duties, even in family situations, is so clearly in the grandparents' favour that I should strike out the claim at this stage without even requiring the grandparents to defend.*[18]

Fehrfinger v Sun Media Corp*[19](2002*)

The Ontario Court of Appeal allowed a claim of breach of fiduciary duty to proceed towards certification based on claims by a woman who had posed as a "*Sunshine Girl*" in the Toronto Sun Newspaper. As part of the newspaper's daily "*Sunshine Girl Feature*" women were photographed in bathing suits and provocative clothing. It was alleged that the photographer who took the pictures and the publisher of the newspaper owed fiduciary obligations to the women who were featured in the photographs and that the duties were breached when they were harassed, intimidated, inappropriately touched or coerced to pose nude or topless, resulting in a breach of their privacy. It was alleged that the photographer "*occupied a position of power, authority and trust over the class*".

So far as the newspaper was concerned, it was contended that it "*invests power, privileges and stature in its employee, which empowers that employee to manipulate, exploit and abuse women who might reasonably come into contact with that employee.*" The Court of Appeal held that the cause of action for a fiduciary duty was sufficiently pleaded in the Statement of Claim and that it could not be said to be plain and obvious that the claim must fail at trial. In the event, the claim was subsequently rejected.

Proctor v Canada*[20](2002*)

Dorothy Proctor, a 17-year-old black woman who was convicted of robbery, was sentenced to three years in Prison in Ontario. She escaped from the Prison on two occasions. After the second escape she became the subject of a prison psychology experiment involving the administration of electroshock therapy, sensory deprivation, and the forced use of LSD. She described the experience as being akin to Dante's *Inferno.*

She sued the Correctional Service in Canada for damages saying that she *"was targeted by researchers because she was viewed as a 'throwaway'* and that her treatment in Prison had resulted in drug addiction and brain damage." Hundreds of prisoners were found to have been subjected to similar experimentation in Canadian

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18 *Fein v Fein* (2001) 21 RFL (5th) 24 (Ont SCJ) para 68.

19 [2002] OJ Mo 2919 2002 Carswell Ont 2470 Ont Court of Appeal.

20 (2002), [2002] OJ No. 350, 2002 Carswell Ont 347 (Ont SCJ).

Prisons throughout the 1960s and 1970s.

The LSD programme was run by a Dr George Scott and it used prisoners as well as patients in mental hospitals as guinea pigs. The funding for the research was partly provided by the American CIA.

In the event Dr Scott was stripped of his license to practice medicine - not for dosing prisoners with drugs - but for using drugs and electroshock treatment to aid his seduction of female patients, which he did for a period of five years. Another person who was subjected to Dr Scott's treatments said that in 1969 Scott gave him *"ferocious jolts of electroshock"* as punishment for not cooperating with him. Scott was sued by 24 women who had been subjected to his LSD experiments. The Doctor was unapologetic for what he had done.[21]

Dorothy Proctor filed her proceeding more than 35 years after the initial events which gave rise to her cause of action.

It was reported that the litigation ultimately settled.

The litigation raised the important question whether there is a fiduciary relationship between (a) staff in a mental institution and the patients there and (b) between a prisoner and the Prison authorities.

The relationship between those parties is not the subject of a contract. Violence between two people can be the subject of a tort – for example, battery - but whether "battery" is the most appropriate legal cause of action for all the types of harm to which Dorothy Proctor was subjected is not clear to me. I think that a fiduciary relationship is a more natural and appropriate cause of action to apply to someone in her circumstances.

Where the abuse could only occur because of the relationship that the abused patients and prisoners had with the incarcerating authorities, it would be understandable that our Courts would say that the prison authorities and the hospital authorities owe fiduciary duties to the patients and prisoners in their custody and that they are not permitted to deliberately harm them.

Romagnuolo v Hoskin*[22] (2001*)

This case involved a motion to dismiss a claim by plaintiffs that the Police Services Board, the Police Chief and some Police Officers stood in a fiduciary relationship to them. The plaintiffs claimed that the respondents owed them a fiduciary duty as members of the general public which was breached when one of the plaintiffs and his father were shot by Police Officers following a struggle that ensued after an attempted

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21 His attitude to the litigation against him and the allegations of the people whom he had harmed was to tell the Ottawa Citizen in 1997 that he had no regrets: "I am happy with myself. I don't give a shit."

22 (2001), [2001] OJ No. 3537, 2001 Carswell Ont 3183 (Ont SCJ).

arrest. One of the men later died from his injuries.

The allegations against the defendants were that they were responsible for the supervision, training, direction and control of the Police Officers and that they had breached the duty of care in failing to monitor the Police Officers and ensure adequate training, supervision and directions. It was held that the facts as pleaded did not establish the requisite proximity for a private law duty of care as between Chiefs of Police and the plaintiffs. And there wasn't a fiduciary duty.

The fiduciary obligations – the Crown and Māori

The Canadian Supreme Court held in *Guerin v the Queen* (1984)13 DLR (4th) 321 at 329 that obligations of a private law nature could be enforced within the relationship between the Crown and Indigenous peoples. The majority held that the relationship between the Crown and Indigenous peoples could be defined as fiduciary in nature and that fiduciary obligations could arise when the Crown exercised the power of compulsory expropriation of reserve land and in the creation of new reserves.

The Crown has been held in Canada to owe fiduciary obligations to Indigenous peoples where those interests conflict with other groups whose interests the Crown must also have regard to.

In Canada, the classification of the Crown-Indigenous relationship as being fiduciary in nature has led to the development of an enforceable legal doctrine which can be used to generate a remedy in instances where the Crown has acted unconscionably or infringed Indigenous rights.

These developments have sparked a parallel attempt in New Zealand to create a doctrine of a fiduciary relationship between the Crown and Māori.

The *Lands* case (*New Zealand Council v Attorney General* [1987] 1 NZLR 641) was the first case of this type. It was argued that the relationship between the Crown and Māori was characterised as having *"fiduciary-like obligations."* However, it has not been necessary to expand the law in this way because the Courts can declare the existence of obligations on the Crown in the context of the duties expressed in the Treaty of Waitangi. Cooke P held in the *Lands* case that the partnership between the Crown and Māori created duties that are *"analogous to fiduciary duties"* that require the Crown to actively protect Māori resources to the fullest extent reasonably practicable.

Cooke P made some obiter statements indicating that the Canadian fiduciary doctrine may be of guidance to New Zealand. In *Te Runanga O Muriwhenua Inc v the Attorney General* [1990] 2 NZLR 641 he embarked on an obiter discussion of the principles that could potentially apply in the situation and he said that he considered that the *Lands* principles of partnership and fiduciary analogies were consistent with the Canadian law.

In *Te Runanga O Wharekauri Inc v Attorney General* [1993] 2 NZLR 301 he noted that the Treaty of Waitangi created an enduring relationship of a fiduciary nature akin to partnership with each party accepting a positive duty to act in good faith, fairly,

reasonably and honourably. He said that in New Zealand the Treaty of Waitangi is *'major support'* for the fiduciary duty which is widely accepted in the Commonwealth as existing between the Crown and Indigenous peoples.

In a dissertation on this topic by Kendal Luskie that was submitted for the degree of Bachelor of Laws at the University of Otago in October 2010, it was said that *"the scope of the Crown-Māori fiduciary idea remains difficult to define and there are uncertainties relating to its application."*

"Further, the New Zealand Courts have tended to avoid defining the fiduciary idea and instead, defined the Crown-Māori relationship by the Treaty of Waitangi principles in which the fiduciary idea is inherent. It follows that any potential for fiduciary obligations to be enforced as an independent legal action, capable of generating equitable remedies or damages, stands on somewhat tenuous grounds"

He says that it remains possible for fiduciary obligations to be applied within specific relationships between the Crown and Māori. But *"the Crown is unlikely to be held to owe a wholesale fiduciary obligation to all Māori. Further, there remains a possibility that a relational duty of good faith could eventually be developed at common law between the Crown and Māori."*

The expansion of the law concerning fiduciary relationships in New Zealand

D v A is interesting in that it appears to expand the ambit of fiduciary relationships that will be recognised by the Courts. In practice this is not quite correct since Justice Morris held in *B v R* (1996)[23] that a daughter who had been the subject of sexual abuse by her father had breached his fiduciary duty to her and the executor of the father's estate was ordered to pay $35,000 out of the father's estate that was worth $110,000. The estate was also ordered to pay the daughter $10,000 for costs.

In retrospect, the expansion of the fiduciary concept spreading into family relationships seems obvious. One of the seminal works on the law concerning fiduciaries was Professor Finn's book *"Fiduciary Obligations"* that was published in 1977. He wrote that:

> "*In this survey of the law the writer has all but totally disregarded the fiduciary aspects of the family relationship, and of guardianship. These branches of the law have moved largely out of the realms of the rules of common law and equity, and are increasingly being regulated by legislation.*"

In practice, I think it reasonable to contend that there is no cause of action that fits more naturally into the facts of cases involving children who are the subject of serious abuse by a parent than a cause of action based on a breach by the parent of a fiduciary obligation to the children.

I consider the notion that an expansion of fiduciary responsibilities is akin to letting the Genie out of the bottle, with the consequence that the law will become unhelpfully

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23 10 PRNZ 73

unpredictable, ought not to prevent the Courts from extending the law so as to provide remedies where they need to exist. This is so quite apart from the fact that the law in Canada and the USA has more extensive rules concerning fiduciary relationships and fiduciary obligations than exist in New Zealand, and so far as I am aware, the Genie never came out of the bottle in either country.