How the courts might expand the law around fiduciary relationships

If Kós P is right, and New Zealand courts are likely to expand the number of fiduciary relationships, what changes might be made?

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Kós P said last year that relationships "recognised [by the courts] as fiduciary are likely to grow" and in *D v A* [2022] NZCA 430 the Court of Appeal has done just that. It has held that parents owe enforceable fiduciary duties to their children.

The Court of Appeal relied in part on the Canadian Supreme Court's decision in *M(K) v M(H)* [1992] 3 SCR 6 where it was held that parents owed fiduciary duties to their children.

This is one of many cases where the Canadian courts have expanded the role of fiduciary law. The extent to which they have shown their enthusiasm for the fiduciary concept has given rise to criticism from Australia.

The former Chief Justice of the Australian High Court, Sir Anthony Mason, was highly critical of the Canadians. He is said to have told the then Chief Justice of the Canadian Supreme Court, Bryan Dickson, that "he understood that in Canada there were three classes of people: those who are fiduciaries; those who are about to become fiduciaries; and judges who keep creating new fiduciary duties".

Professor Paul Finn whose writings on the law about fiduciary obligations are highly regarded, has said," The Canadian invocation of 'the fiduciary' can on occasion be quite breath-taking."

Sir Anthony Mason so disapproved of the law about fiduciaries that he said "the fiduciary relationship is a concept in search of a principle." To that, Professor Rotman, a distinguished Canadian academic, said 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".

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These are some of the relationships the Canadian courts have considered. I will not clutter this short article with case citations.

In *Norberg v Wynrib* (1992), a doctor became aware of a female patient's drug addiction and he prescribed drugs for her in exchange for sexual favours. It was held that he was in a fiduciary relationship with her and his exploitation of her was a breach of his duties.

> The fiduciary relationship is a concept in search of a principle

In *Szarfer v Chodos* (1986), a lawyer learnt from his male client that he was having marital problems which arose from (among other things) his sexual impotence. The lawyer proceeded to initiate a sexual relationship with the client's wife. This was held to be a breach of his fiduciary duties and the client was awarded damages.

A mayor of Toronto, Mel Lastman, had an affair with a woman which resulted in the birth of two children. They argued 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. The claim failed.

In a separate proceeding, the mother of the two children claimed the mayor had breached a fiduciary duty to support them financially. This claim also failed. It was said to be an attempt to circumvent the child support legislation.

In *Fein v Fein* (2001), a mother sued her in-laws for breach of fiduciary duties stemming from their failure to adequately support the family's formerly lavish lifestyle. When the parents separated, the in-laws withdrew the significant funding they had been giving to the family. They had paid for groceries, petrol, clothing, a house and holidays, and given the mother a substantial weekly allowance. The judge said the claim arose from a "withdrawal of largesse" but allowed the claim to proceed, saying it was not plain and obvious that it had no chance of success.

In *Fehrfinger v Sun Media Corp* (2002), a woman who had posed as a *Sunshine Girl* in a newspaper as part of the paper's

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daily *Sunshine Girl* feature, alleged the photographer who took the pictures and the publisher of the newspaper owed fiduciary duties to her that were breached when the women were subsequently harassed, intimidated and inappropriately touched or coerced to pose nude or topless "as a result of the publicity that was given in the paper".

If that cause of action had been successful, a large proportion of the tabloid press in the Western world would be in trouble every day. The optimistic claim was dismissed.

In *Proctor v Canada* (2002), a woman who at the age of 17 was convicted of a robbery was sentenced to prison in Canada and subjected, with many others, to an appalling form of medical experimentation.

She was subjected to electroshock therapy, sensory deprivation and the forced ingestion of LSD. She ended up with brain damage and a drug addiction. This form of experimentation, which was partly funded by the CIA, was used in Canada not only on prisoners but also on mental hospital patients.

Unfortunately for the lawyers, the *Proctor* case was settled without a ruling on whether prison authorities owe fiduciary duties to those in their care.

If a New Zealand court today were asked whether prison authorities and hospital authorities have a fiduciary obligation not to deliberately harm the health of people committed to their care, I think it would likely be held that there is a fiduciary relationship between them which will be breached when the authorities deliberately cause harm.

In *Stewart v Canadian Broadcasting Corp*, a judge found that a prominent criminal defence lawyer had breached his fiduciary duties to a former client by dramatising the client's case on a nationally televised program 13 years after the events which led to his conviction for criminal negligence causing death.

The judge limited the financial relief the lawyer had to pay because he "was not alone in not keeping up with the wave of changes in fiduciary principles".

This brief account is intended as a glimpse into how there appears to be significant potential for the courts to expand the number of relationships that might be made the subject of fiduciary accountability. ■

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