NEW FIDUCIARY RELATIONSHIPS

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Justice Kós speaking extra-judicially has said that:

> "*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.*"[1]

In this Paper I attempt to show some of the ways in which the Courts will expand the number of fiduciary relationships.

The Canadian Courts have for many years led the way in the Commonwealth in this development.

During the 1970s lawyers acting for parties in contractual disputes became aware of how fiduciary relationships and obligations could usefully be invoked. The plaintiff – the "*beneficiary*" of an alleged relationship – would contend that the defendant owed fiduciary obligations, even though the terms of the contract made no mention of them.

The Australian judiciary was critical of the willingness of the Canadian Courts to countenance the expansion of the fiduciary concept. The Chief Justice of the Australian High Court, Sir Anthony Mason, was highly critical of something as basic as the notion of fiduciary relationships saying:

> "*The fiduciary relationship is a concept in search of a principle.*"[2]

Sir Anthony Mason is reputed to have told the then Chief Justice of the Supreme Court of Canada (Brian Dickson) that:

> "*He understood that in Canada there were only three classes of people; those who are fiduciaries; those who are about to become fiduciaries and Judges who keep creating new fiduciary duties.*"[3]

Professor Paul Finn has spoken in a similar way. He has said that:

> "*The Canadian invocation of 'the fiduciary' can on occasion be*

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1. 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.
2. "Themes and Prospects" in P D Finn ed "Essays in Equity" 1985
3. E Chermiak "Comment on Paper by Profession Jeffrey G MacIntosh" in Fiduciary Duties, Law Society of Upper Canada Special Lectures, 1990 (Toronto: De Boo, 1991) at 275.

quite breathtaking."[4]

The vagueness of the fiduciary concept

There has been much support for finding new fiduciary relationships in Canada although there has been a reluctance on the part of Canadian Courts to find fiduciary relationships unless to do so is seen to be absolutely necessary and where no Common Law remedy proves appropriate to the task. Sir Anthony Mason's criticisms of the expansion of fiduciary relationships appears in part to have stemmed from a fundamental dislike of the law concerning fiduciary relationships.

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.*" [5]

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 Minerals Limited*[6] 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*

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4 P Finn, "Fiduciary Law and the Modern Commercial World" in E McKenrick, ed., Commercial Aspects of Trusts and Fiduciary Obligations (Oxford: Clarendon Press, 1992 at p. 42).

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

6 (1989) at 61 DLR (4th) 14 SCC at 26. [R 17]

relationships and circumstances with no discernible end in sight."[7]

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) [8]the Supreme Court of Canada held that a father's positive fiduciary duties towards a child are breached when he "*subjects her to incestuous acts.*"[9] 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.*"[10]

Re Norberg v Wynrib*[11] (1992*)

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

> "*To look at the events which occurred over the course of the relationship between Dr Wynrib and Ms Norberg from the 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.*"[12]

Szarfer v Chodos*[13](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 client's wife was a legal secretary and the lawyer proceeded to initiate an adulterous affair with her. The client was awarded damages of C$43,663 in respect of the lawyer's breach of his fiduciary obligations.

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 claimed that the Mayor's *"participation in the act of procreation*" created a fiduciary relationship from which duties flowed from him to the children who were born as a result of the affair.[14] In the event, the claim was struck out.

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7 "Fiduciary Law" Thomson/Carswell 2025 page 2

8 [1992] 3 SCR 6

9 (1992) 96 DLR (4th) 289 (SCC) 4 [1992] 3 SCR 6 at 61-62.

10 "Fiduciary Law" page 318.

11 (1992) 92 DLR (4th) 449 (SCC).

12 Ibid page 484.

13 (1986) 54 OR (2d) 663.

14 Louie v Lastman (No1) 54 OF(3d) 286

In a separate proceeding the mother of the two children claimed that the Mayor had breached his fiduciary duty to support them. 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*[15] 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 the mother with a $300 per week allowance etc. 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.*[16]

Fehrfinger v Sun Media Corp*[17](2002*)

The Ontario Court of Appeal allowed a breach of fiduciary duty cause of action 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*[18](2002*)

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15 (2001) 21 RFL (5th) 24 (Ont SCJ).

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

17 [2002] OJ Mo 2919 2002 Carswell Ont 2470 Ont Court of Appeal.

18 (2002), [2002] OJ No. 350, 2002 Carswell Ont 347 (Ont SCJ).

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 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 says 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. 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."*

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. It may be the subject of a tort – for example, battery - but whether "battery" is appropriate for all the types of harm to which Dorothy Proctor was subjected is not clear to me.

In 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 authorities owe fiduciary duties to the patients and authorities not to deliberately harm them.

Romagnuolo v Hoskin*[19]*(2001)

This case involved a motion to dismiss a claim by plaintiffs that the Police Services

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19 (2001), [2001] OJ No. 3537, 2001 Carswell Ont 3183 (Ont SCJ).

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 that was breached when one of the plaintiffs and his father were shot by Police Officers following a struggle that ensued after an attempted 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 expansion of the law concerning fiduciary relationships in New Zealand

The *D v A*[20] case 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)[21] that a daughter who had been the subject of sexual abuse by her father had breached his fiduciary duty to her and he 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, there is no legislation that provides appropriate relief to children who are the subject of serious abuse by a parent.

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

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20 [2022] NZCA 430,14.9.22

21 10 PRNZ 73.

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.[22]

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.*"[23]

As both Kós P and Collins J agreed that sexual and violent physical abuse of the children amounted to a breach of fiduciary duty, the law now recognises the existence of a cause of action in which exemplary damages can be sought from a parent who resorts to those actions.

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.

What will the new causes of action be?

It is obvious that the door has been opened for claims for exemplary damages for physical and sexual violence that a parent has inflicted on a child.

In view of the necessity for a parent to be able to discipline a child, there are likely to be disputes about the extent to which physical actions give rise to a breach of the fiduciary obligation. Beyond that, the inventiveness of lawyers in Canada has shown how attempts can be made to expand the range of fiduciary relationships very considerably.

I have not referred yet to fiduciary duties owed by the Crown to Māori but the Courts have held that duties of a fiduciary nature apply to the Crown. That development, of itself, may have profound benefits for Māori.

The fiduciary implications of removing a beneficiary

In the *Pollock* case, the Trustees removed the son of the settlor as a beneficiary.

He had angered his father with three things:

- He had conducted an affair with a female member of staff who had stolen from

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

23 Paragraph [136].

the business.

- He had become a drug addict.
- He had refused to join the Company in the role his father gave him and had instead set up an opposition business to compete with his father.

The three Trustees (father, stepmother and solicitor) removed him.

The son alleged that his removal was a breach of fiduciary duty.

The Deed of Trust gave the Trustees an *"absolute and uncontrolled discretion"* to remove beneficiaries.

The Court of Appeal said that there were some obligations *"of a fiduciary nature"* but they did not stop the Trustees from removing the son.

In the *Penson* case, a mother removed a daughter as a beneficiary, with whom she had fallen out.

It was held that she was entitled to do so.