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Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after Breen v Williams

Abstract

[extract] Until the recent High Court decision in *Breen v Williams*, it has been difficult to determine the extent of the schism between the two Jurisdictions. That decision has, however, confirmed that the High Court is unwilling to follow the Canadian approach to the fiduciary principle, and that a clear divergence will continue between the two Jurisdictions.

This article will consider the pro-active approach of the Supreme Court of Canada to the imposition of fiduciary duties, and to the remedies available for breach of fiduciary duty, and contrast this with the more traditional approach towards the fiduciary principle in Australia, as exemplified by the High Court's decision in *Breen v Williams*.

Keywords

fiduciary principle, Australia, Canada, *Breen v Williams*, unconscionability

Cover Page Footnote

My thanks to Professor John Dewar and Ms Sharon Erbacher for reading drafts of this article. Responsibility for all errors remains, of course, that of the author.

COMPARING APPLES AND ORANGES:
THE FIDUCIARY PRINCIPLE IN AUSTRALIA AND
CANADA AFTER *BREEN V WILLIAMS*

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Introduction

Recent years have seen an increasing schism between Australian and Canadian courts as to the fiduciary principle. In Canada, the principle has dramatically expanded, and has been used by the courts as a means of allocating liability in areas traditionally considered the province of tort and contract law.¹ In contrast, fiduciary cases in Australia have been scarce, and the courts have increasingly utilised the doctrine of unconscionability, or turned to the provisions of the *Trade Practices Act*.² Arguably, of course, both the fiduciary principle and the doctrine of unconscionability simply offer differing standards of protective liability. In Professor Finn's terms "they merely represent the dominant shades on a spectrum"³ which regulates unconscionable behaviour. Until the recent High Court decision in *Breen v Williams*,⁴ it has been difficult to determine the extent of the schism between the two Jurisdictions. That decision has, however, confirmed that the High Court is unwilling to follow the Canadian approach to the fiduciary principle, and that a clear divergence will continue between the two Jurisdictions.

This article will consider the pro-active approach of the Supreme Court of Canada to the imposition of fiduciary duties, and to the remedies available for breach of fiduciary duty, and contrast this with the more traditional approach towards the fiduciary principle in Australia, as exemplified by the High Court's decision in *Breen v Williams*. Part Two considers the conceptual foundations of the fiduciary principle, and

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1 See eg. *M(K) v M(H)* (1992) 96 DLR (4th) 289, [hereinafter *M(K) v M(H)*]; *Norberg v Weinrib* (1992) 92 DLR (4th) 449 [hereinafter *Norberg*]; *Hodgkinson v Simms* (1995) 117 DLR (4th) 161 [hereinafter *Hodgkinson*].

2 *Trade Practices Act* 1974 (Cth).

3 Finn, P D, 'The Fiduciary Principle' in Youdan, TG, (ed) *Equity, Fiduciaries and Trusts*, Carswell (1989) at 3.

4 *Breen v Williams* (1996) 138 ALR 259 [hereinafter *Breen*].

determines that in both Australia and Canada, loyalty is still considered the basis of fiduciary duties. In light of this, Part Three examines recent case law in Canada, and the elevation of the fiduciary principle to a source of positive rights. It is concluded that the Court's formulation of "guidelines" for identifying fiduciaries, coupled with an emphasis on vulnerability as a key indicia of fiduciary duties, has contributed to the broadening of the principle. There is also a brief discussion of the part played in this process by remedies. Finally, Part Four is principally concerned with the decision in *Breen v Williams*, but also considers other causes of action which have been used in Australia in place of an expanded fiduciary principle.

The Traditional View of the Fiduciary Principle

It is clear that there exist a core number of relationships which are indisputably fiduciary in nature. The archetype of these is, of course, trustee and beneficiary. To that relationship can be added the following: guardians and wards; agents and principals; lawyers to clients; executors to legatees; partners; directors and companies; master and servant; trustees in bankruptcy; and liquidators. The courts have stated on numerous occasions that the categories of fiduciary relationships are not closed. The addition of new relationships to this category, however, remains problematic. Recent decisions of the Supreme Court of Canada have seen a number of new relationships deemed fiduciary. In that jurisdiction at least, the relationships of parent/child,⁵ doctor/client⁶ and, Crown/First Nations People⁷ are now included in the class of those relationships presumed fiduciary. In Australia, by comparison, the parent/child relationship, as well as that of doctor/client would be considered to have fiduciary aspects, but generally are seen as relationships where a presumption of undue influence arises by reason of a special relationship of influence between the parties,⁸ or as cases where the relationship between the parties is properly regulated by tort law. In the United States, several additional relationships belong to

5 *M(K) v M(H)*, above n 1.

6 Norberg, above n 1.

7 *R v Sparrow* (1990) 70 DLR (4th) 385 [hereinafter Sparrow]. In addition, in lower courts there have been attempts to further broaden the class of relationships presumed fiduciary. See for example, the decision of the Ontario Court, General Division in *Ginsberg v Bell Ginsberg* (June 25, 1993, Rosenberg J, File No. 1515/93. Order No. 093-183-122, at 14), in which it was argued that a husband who had had unprotected sex breached his fiduciary obligations to his wife by subsequently exposing her to the risk of AIDS: noted in the National HIV/AIDS Legal Link Newsletter, Vol 4, No 3, September 1993, at 11.

8 See Cope, M, *Duress, Undue Influence and Unconscientious Bargains*, Law Book Company (1985) at 85-7 and 97.

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the class of fiduciary: majority to minority shareholders,⁹ physicians¹⁰ and psychiatrists¹¹ and even union officials.¹²

In Australia the fiduciary principle can still be seen as a proscriptive principle.¹³ In other words, the fiduciary principle does not import a connotation of positive duties on the part of the fiduciary to the beneficiary,¹⁴ but rather is concerned with the maintenance of loyalty and is activated when a fiduciary seeks improperly to advance his interests in or as a result of the relationship.¹⁵ To be denoted a fiduciary is to be exposed to the full range of equitable rules that are associated with that position.

The close relationship between the term "fiduciary" and the concept of loyalty has been recognised by a number of commentators. Shepherd notes that "the duty of loyalty is, of course, the essence of the fiduciary relationship".¹⁶ He goes on to state that:

... the process of finding the existence of a fiduciary relationship is the process of finding the existence of a duty of loyalty owed by one person to another.¹⁷

It appears, in fact, to be still widely accepted in both jurisdictions that the duty of loyalty is fundamental to any relationship which is categorised as fiduciary. In the recent Supreme Court of Canada decision in *Hodgkinson v Simms* La Forest J, speaking on behalf of the majority, stated that:

... while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.¹⁸

His Honour later adds that:

9 See eg. *Pepper v Linton*, 308 US 295 (1939); *Southern Pac Co v Bogert*, 250 US 483 (1919); *Zahn v Transamerica Corp*, 162 F 2d 36 (3rd. Cir. 1947).

10 *Hammonds v Aetna Casualty & Sur. Co.*, 237 F.Supp 96 (1965); *Lockett v Goodill*, 71 Wash 2d 654 (1967).

11 *MacDonald v Clinger*, 446 NYS 2d 801 (1982) held that physicians are fiduciaries with respect to confidential information.

12 *Hines v Anchor Motor Freight Inc.*, 424 US 554 (1976) held that the a union as statutory representative of the employees is subject always to complete good faith and honesty of purpose in the exercise of its discretion (at 564).

13 Finn, PD, 'The Fiduciary Principle', above n 3 at 25. *Breen v Williams*, above n 4 at 20.

14 *Ibid* at 28.

15 *Ibid* at 25.

16 Shepherd, JC, *The Law of Fiduciaries*, Carswell (1981) at 48.

17 *Ibid*.

18 *Hodgkinson*, above n1 at 173.

[t]he concepts of unequal bargaining power and undue influence are also often linked to discussions of the fiduciary principle. ... Indeed, all three equitable doctrines are designed to protect vulnerable parties in transactions with others. However, undue influence focuses on the sufficiency of consent and unconscionability looks to the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed.¹⁹

The fact that the notion of loyalty is central to the fiduciary principle is reflected in the rules to which equity subjects one who is classed a fiduciary. The main proscriptions that a fiduciary faces are those against conflict of interest and improper gain.²⁰ First, a duty is imposed upon fiduciaries to avoid situations in which there may be conflict between interest and duty. The strictness of the rule is reflected in the fact both actual conflict, as well as a significant possibility of conflict, must be avoided. Despite some indications that courts may now apply these rules more flexibly, it is still true to say that the honesty of the fiduciary in any transaction is not a complete defence.²¹ Further, the fiduciary is liable to account to the principal for any benefit or gain obtained or received in circumstances where there existed that conflict of personal interest, or significant possibility of such conflict with the duty or loyalty she or he has undertaken.²² The justification for these rule can be found in the case of *Bray v Ford*.²³ In that case Lord Hershell stated that:

It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.²⁴

Thus, the fiduciary acts in the interests of the beneficiary. In fact, the distinguishing characteristic of the fiduciary relationship is the loyal securing of the beneficiary's interests above those of the fiduciary; hence the fact that the serious *possibility* of conflict is sufficient to found a breach of fiduciary duty. The fiduciary's purpose in that relationship is to secure the interests of the beneficiary above his own (or their joint interests in the case of a partnership). Finn suggests that it is in these rules that the true nature of the fiduciary is revealed:

19 Ibid at 173-4.

20 Evans, M, *Outline of Equity and Trusts*, Butterworths (1988) at 86.

21 See Youdan, TG, 'The Fiduciary Principle: The Applicability of Proprietary Remedies', in Youdan, TG (ed), above n 3 at 94.

22 *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 per Deane J. See also *Consul Development v DPC Estates* (1975) 5 ALR 231 at 248 per Gibbs J.

23 *Bray v Ford* [1896] AC 44.

24 Ibid at 51-2.

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[the fiduciary principle] has been used, and is demonstrably used, to maintain the integrity, credibility and utility of those relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.²⁵

It originates, self-evidently, in public policy: in a view of desired social behaviour for the end this achieves. To maintain the integrity and utility of those relationships in which the (or a) role of one party is perceived to be the service and interests of the other, it insists upon a fine loyalty in that service.²⁶

These words are echoed by Mason CJ (as he then was) in a recent article. Mason comments that the Court's use of the fiduciary principle is in response to standards expected by the community in certain relationships:

The absence of clear definition has enabled the courts to classify as fiduciaries persons who would not have been so regarded at an earlier time. The reason why the classification has been more extensive is that the courts, reflecting higher community standards or values, perceive in a wide variety of relationships that one party has a legitimate expectation that the other party will act in the interest of the first party or at least in the joint interests of the parties and not solely self-interestedly.²⁷

The distinguishing feature of loyalty can be discerned in those relationships which it was noted above form the "core" of those relationships considered fiduciary by nature. By placing the interests of the beneficiary above those of the fiduciary, the loyalty of the fiduciary is ensured. As Finn states:

[i]f no issue of disloyalty is involved, such matters will be actionable through those primary bodies of law which constitute or govern the ordinary incidents of the relationship in question - negligence, breach of contract, or breach of trust.²⁸

There is no doubt, therefore, that both in Canada and in Australia loyalty, and its associated notions of trust and confidence, are still the foundations of the fiduciary principle. Yet despite these common foundations, the contours of the principle now appear markedly different in each jurisdiction. This begs the question of how and why the Courts in each jurisdiction diverged.

25 Above n 3 at 26.

26 Ibid at 27.

27 Mason, AF, 'The Place of Equity and Contemporary Equitable Remedies in the Common Law World', (1994) 110 LQR 239 at 246.

28 Above n 3 at 28.

Judicial Approaches to the Fiduciary Principle in Canada

The Existence of Fiduciary Duties

In Canada, the last decade has seen the increasing prominence of the fiduciary principle as a primary means for ascertaining liability in non-traditional areas, or areas traditionally the province of tort law. The 1984 decision in *Guerin v R*,²⁹ where the Supreme Court found that on the facts the Crown was under a fiduciary duty to First Nations Peoples with regard to the use made of Indian reserves after surrender, is one obvious example of this. In addition, however, in several recent cases there has been a "recognition" by the courts that fiduciaries can be split up into different categories. These were outlined by La Forest J in the Supreme Court decision of *Lac Minerals Ltd v International Corona Resources Ltd*.³⁰ His Honour suggested that confusion has arisen in the fiduciary area primarily due to the use of the term in differing circumstances. He stated that there were at least three ways in which the term could be employed,³¹ the first two of which are relevant to this discussion.³²

According to La Forest J, the first category of use concerns those relationships in which, by reason of their inherent purpose or presumed factual or legal incidents, there will be a presumption of a fiduciary obligation.³³ This class includes those relationships traditionally identified as fiduciary: for example, trustee and beneficiary; principal and agent; and director and company.

The second category concerns fiduciary obligations which arise out of the specific circumstances of a relationship. In this case there is no legal relationship in existence which is deemed by the court presumptively to give rise to fiduciary obligations. Rather, the specific facts of a case, and the conduct of one or other of the parties, will cause a fiduciary obligation to arise even though the relationship is one which would not normally be expected to give rise to fiduciary obligations. The existence of this obligation is a question of fact to be determined from an examination of the particular facts and circumstances surrounding each relationship.³⁴ Thus, with this category there is no presumptively fiduciary relationship. Rather, the court may find that some aspects of a relationship are fiduciary in nature because of the particular facts at hand. This category is clearly closer to the Australian approach to the fiduciary principle outline in Part III. In *LAC*

29 *Guerin v R* (1984), 13 DLR (4th) 321 [hereinafter *Guerin*].

30 *LAC Minerals Ltd v International Corona Resources Ltd* (1988) 61 DLR (4th) 14 [hereinafter *LAC Minerals*].

31 *Ibid* at 28.

32 According to La Forest J, the third use of the term "fiduciary" occurs where fiduciary language is resorted to in order to achieve a desired result, eg. the granting of a tracing order, even though there is no real fiduciary obligation. See eg. *Goodbody v Bank of Montreal* (1974) 47 DLR (3d) 335, where a thief was considered to be a fiduciary so as to be able to grant a tracing order.

33 *LAC Minerals*, above n 30 at 28.

34 *Ibid* at 29.

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Minerals Wilson J referred to the first class as fiduciaries *per se*,³⁵ or fiduciary *relationships*. The second class are often referred to as fiduciaries *ad hoc*.

It is suggested that the classification by the Canadian courts of these two categories of fiduciaries has materially affected the development of the law in this area. If differing classifications of fiduciary are recognised, it then becomes necessary to answer two separate questions: namely, when will a relationship be presumed to be fiduciary in nature, as opposed to when can it be said that although there is no fiduciary relationship, fiduciary obligations or duties have arisen between two parties? In addition, how is it decided which question to ask? Although such a distinction may seem artificial, the Canadian Supreme Court has chosen differing approaches to answer each of these questions. In *Hodgkinson v Simms* La Forest J stated that:

In *Lac Minerals* I elaborated further on the approach proposed by Wilson J in *Frame v Smith*. There I identified three uses of the term fiduciary ... The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has the duty to act in the best interests of the other party ... In seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J's three-step analysis is a useful guide.

As I noted in *Lac Minerals*, however, the three step analysis proposed by Wilson J encounters difficulties in identifying relationships described by a slightly different use of the term 'fiduciary', *viz.*, situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue.³⁶

Recent cases have been primarily concerned with identifying fiduciary relationships of the first type identified by La Forest J in *Lac Minerals*: i.e. those relationships in which it is presumed that one party owes the other fiduciary duties. The approach of Canadian courts has been to identify "guidelines" which if applied can provide guidance in identifying new fiduciary relationships. Notably, these guidelines have emphasised a requirement that the beneficiary be particularly vulnerable to the fiduciary. Peculiar or particular vulnerability has come to be seen as the stamp of a fiduciary relationship. A comparison of these guidelines with the nature and

35 Ibid at 16.

36 *Hodgkinson*, above n 1, at 176.

purpose of the fiduciary principle reveals a doctrine which is becoming increasingly divorced from its conceptual underpinnings.

One of the earliest decisions in which an attempt was made to formulate "guidelines" is the decision of Wilson J in the Supreme Court of Canada in *Frame v Smith*.³⁷ The case concerned an action for damages by the plaintiff against his former wife, who had been granted custody of the children of the marriage, alleging that she had deliberately interfered with his right of access to the children, resulting in expense, as well as emotional and psychiatric distress. The majority of the court failed to find any cause of action. Wilson J, however, while acknowledging that there was no cause of action in tort or for violation of any common law right of access, held that there was a cause of action for breach of fiduciary duty. In reaching this conclusion, her Honour laid down a three fold "test" for the existence of a fiduciary relationship. This "test" has subsequently been adopted with approval by the Supreme Court.³⁸ Her Honour stated that:

Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.³⁹

In essence this is very similar to Mason J's formulation in *Hospital Products v United States Surgical Corporation*.⁴⁰ The same emphasis on discretion, power and vulnerability can be observed. Wilson J noted that the element of vulnerability arises from the inability of the beneficiary to prevent the injurious exercise of power or discretion, coupled with the grave inadequacy or absence of other legal or practical remedies to redress the exercise of the discretion or power. Because of the requirement of vulnerability, for example, fiduciary obligations are seldom present in arms length commercial transactions,⁴¹ where both parties are assumed to be on an equal footing.

Unfortunately, as Lee notes, Wilson J does not make it clear from where the vulnerability arises.⁴² Subsequent decisions of the Supreme Court are equally unclear, both as to the source of the vulnerability, and

37 *Frame v Smith* (1987) 42 DLR (4th) 81.

38 See *LAC Minerals* above n 30 at 29 per La Forest J; *Hodgkinson*, above n 1 at 176, per La Forest J; *Norberg* above n 1 at 489 per McLachlin J.

39 *Frame v Smith*, above n 37 at 99.

40 *Hospital Products v United States Surgical Corporation* (1984) CLR [hereinafter *Hospital Products*].

41 *Ibid* at 100.

42 Lee, E, 'Fiduciary Duty and Family Obligations: The Supreme Court of Canada Signals Change', (1993) 57 Sask LR 457 at 463.

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indeed as to whether it is even an essential ingredient of a fiduciary relationship. In *LAC Minerals v International Corona Resources Ltd.*⁴³ La Forest J noted that vulnerability is not essential. Rather it is one of a number of indicia that a fiduciary relationship exists. In *Hodgkinson v Simms*, he further de-emphasised the role of vulnerability. His Honour stated that:

From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalised duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasise from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationships [*sic*] though it is an important *indicia* of its existence.⁴⁴

In *LAC Minerals*, on the other hand, Sopinka J identifies vulnerability as "[t]he one feature ... which is considered to be indispensable to the existence of the relationship".⁴⁵ In addition, in terms reminiscent of Dawson J in *Hospital Products*, the minority in *Hodgkinson* considered that vulnerability is indispensable.⁴⁶ Despite La Forest J's acceptance that vulnerability is not the hallmark of the fiduciary relationship, it appears that lower courts persisted in the assumption that this is the key to the identification of fiduciary duties. In *Murray v Murray*,⁴⁷ a recent decision of the Alberta Court of Appeal, McClung JA, speaking for the court, stated that:

Central to any fiduciary relationship is a finding that the beneficiary is at the mercy of the fiduciary, or even vulnerable to the other who administers the discretion or power over their relationship ...⁴⁸

His Honour did, however, decline to find that the relationship between a divorcing couple is fiduciary in nature, primarily because of the impossibility of realistically expecting two parties negotiating a marital settlement to "scrupulously insure the other's interests in all cases".⁴⁹

In addition, there has been a tendency on the part of Canadian Courts to assume that vulnerability is derived from the factual matrix surrounding the case, rather than from the inherent nature of the relationship between the parties. An example of this is the decision of the Federal Court of Appeal in *Apsassin et al v The Queen*.⁵⁰ *Apsassin* concerned a surrender of mineral rights in an Indian reserve in 1940 to the Crown "in trust to lease the same" and invest the proceeds for the Indian band's benefit. Several

43 *LAC Minerals* above n 30.

44 *Hodgkinson* above n 1 at 173.

45 *LAC Minerals* above n 30, at 63.

46 *Hodgkinson* above n 1 at 218-9.

47 *Murray v Murray* (1995) 119 DLR (4th) 47.

48 *Ibid* at 58.

49 *Ibid* at 54.

50 *Apsassin et al v The Queen in Right of Canada* (1993) 100 DLR (4th) 504 (FCA) [hereinafter *Apsassin*].

years later, in 1945, the band surrendered the entire reserve on similar terms. The band argued that the Crown was under a fiduciary duty to them prior to the surrender of the reserve and breached that duty by failing to advise the band against surrendering the lands, as well as a duty after surrender to lease or sell the land in their best interests, which was breached by failing to reserve the mineral rights when the reserve land was sold to the Director of the Veteran's Land Act.

Their Honours considered the question of whether the relationship between the Crown and First Nations Peoples is fiduciary in nature: i.e. does that relationship belong in the category of relationships which are indisputably fiduciary in nature?⁵¹ Again, this case illustrates the tendency of the courts to dichotomise fiduciary relationships into categories. Stone JA, in answering this question, relied on the three stage "test" laid down by Wilson J in *Frame v Smith*. By applying the "test" outlined in these cases, Stone JA came to the conclusion that a fiduciary relationship existed between the Crown and Indian band prior to surrender. Stone JA indicated that the Indians were in a position of great vulnerability, being trappers with little or no formal education, and lacking sophistication in matters of business. In addition, they were dependent on the Crown for its advice and protection.⁵² Further, the Crown was able to initiate the formal surrender procedure at a time when it was under pressure to provide lands for settlers.⁵³ Marceau JA's reasoning was virtually identical. His Honour also determined that the relationship between the Crown and First Nations people was one that should be characterised as fiduciary in nature.

It is undoubtedly true that many First Nations Peoples are disadvantaged and vulnerable to the Crown due to such factors as outlined above by Stone JA. However, it is questionable whether vulnerability should be sourced in external factors such a relative levels of education. Of course, in *Mabo v State of Queensland (No 2)*,⁵⁴ Toohey J also found that the Crown is under a fiduciary duty to Indigenous Peoples. However, in recognising that the vulnerability of the Meriam Peoples is the result of the structure and nature of the relationship between those Peoples and the Crown, Toohey J arguably remains truer to the traditional fiduciary principle. If vulnerability is determined to be a key indicator of a fiduciary relationship, and in determining the existence of vulnerability a plethora of external factors are taken into account, then the potential to "discover" fiduciary relationships is correspondingly high.

Similarly, in *Norberg*, La Forest J sourced the plaintiff's vulnerability to sexual exploitation by her doctor in her matrimonial, financial and personal problems,⁵⁵ rather than in the nature of the relationship between the two.

51 Ibid at 565.

52 Ibid at 567-8.

53 Ibid at 567.

54 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 [hereinafter *Mabo No 2*].

55 *Norberg*, above n 1 at 462.

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In the same case, McLachlin J attempted to reconcile the differing views as to the part played by vulnerability. Her Honour applied the test outlined by Wilson J in *Frame v Smith* to the doctor-patient relationship. In relation to that test her Honour stated that:

[t]he third requirement is that of vulnerability. This is the other side of the differential power equation which is fundamental to all fiduciary relationships. In order to be a beneficiary of a fiduciary relationship a person need not be *per se* vulnerable. As Frankel put it, at p.810:

... the entrustor's vulnerability to abuse of power does not result from an initial inequality of bargaining power between the entrustor and the fiduciary. ... The relation may expose the entrustor to risk even if he is sophisticated, informed and able to bargain effectively. Rather, the entrustor's vulnerability stems from the *structure* and *nature* of the fiduciary relation. (Emphasis in original.)

It is only where there is a material discrepancy, in the circumstances of the relationship in question, between the power of one person and the vulnerability of the other that the fiduciary relationship is recognised by law. Where the parties are on a relatively equal footing, contract and tort provide the appropriate analysis.⁵⁶

Only recently, has the notion of peculiar or special vulnerability become so closely connected with this theory. In the Supreme Court decision in *Guerin* decided in 1984, vulnerability played almost no part. Further, the emphasis on vulnerability which has become associated with this theory has allowed the courts to widen the cases in which it has been found that the parties are in a fiduciary relationship beyond the conceptual underpinnings of the principle. Undivided loyalty no longer appears necessary to the relationship. It is suggested that the better view is that vulnerability may or may not be present, but is clearly not indispensable. Rather, as Gautreau notes, it is the natural result of reliance by the principal on the fiduciary's undertaking to act in his interests.⁵⁷

As well as evidence of a return by some members of the Supreme Court to a more traditional view of the part played by vulnerability in identifying a fiduciary relationship, La Forest J's judgment in *Hodgkinson* identified loyalty and relinquishment of self-interest as key criteria by which to determine whether one party to a relationship is a fiduciary. *Hodgkinson* concerned an action brought for breach of fiduciary duty to recover losses made on four investments which were recommended by the respondent, an

56 Ibid at 491. In *Hodgkinson*, above n 1, La Forest J also appears to accept that vulnerability arises from the structure of the relationships between the parties, rather than in external factors. His Honour stated that: "The first [sense in which the term fiduciary is used] is in describing relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability". (at 176, emphasis in original).

57 Gautreau, M, 'Demystifying the Fiduciary Mystique', (1989) 68 Can Bar Rev 1 at 5.

accountant. All members of the Court agreed that the relationship of financial adviser and client is not one which should be considered fiduciary *per se*. The majority, however, (La Forest J, with whom Gonthier, L'Heureux-Dub  and Iacobucci JJ agreed) found that in the circumstances a fiduciary obligation had arisen. La Forest J stated that:

... while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.⁵⁸

...

... given all the surrounding circumstances, could one party have reasonably expected that the other would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust are non-exhaustive evidential factors to be considered.

Thus, outside the established categories what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.⁵⁹

In the earlier case of *LAC Minerals* La Forest J also considered the circumstances in which a fiduciary relationship in the second sense will arise. His Honour concluded that:

... the issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would refrain from acting in such a way contrary to the interests of that other.⁶⁰

La Forest J's approach in *Hodgkinson* and *LAC Minerals* to the question of when a fiduciary obligation will arise clearly resembles that of Professor Finn to the fiduciary principle more generally:

That one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence no doubt will be important in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. *The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so*

58 *Hodgkinson*, above n 1 at 173.

59 *Ibid* at 176-177.

60 *LAC Minerals*, above n 30 at 40.

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align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that the other's interests are being served. ... But equally, the expectation may be judicially prescribed because the law itself ordains it to be that other's entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement..., or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.⁶¹

Finally, in the recent Supreme Court of Canada decision in *Apsassin v The Queen*, McLachlin J, with whom Major and Cory JJ agreed, briefly outlined the circumstances in which a fiduciary obligation would arise. Her Honour emphasises loyalty and relinquishment of self-interest as being central to the fiduciary concept:

... a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person... . The vulnerable party is in the power of the party possessing the power or discretion which is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes ... his power over a matter to another person. The person who has ceded the power *trusts* the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.⁶²

Although McLachlin J does note that the beneficiary is someone who is "peculiarly vulnerable", it is clear from her decision in *Norberg*, above, that she considers that the vulnerability arises from the inherent nature of the relationship, rather than external factors.

It is arguable that the emphasis of the majority in *Hodgkinson* on loyalty, coupled with a recognition that vulnerability is an indicia, not the hallmark, of fiduciary obligations signals a move away from the broad approach which has characterised decisions of the Supreme Court of Canada in recent years. However, whether it signals a return to a more "traditional" approach is debatable. Certainly in recent lower court decisions there is evidence that courts are still willing to utilise the fiduciary relationship in novel situations.⁶³

61 Finn, PD, 'The Fiduciary Principle', above n 3 at 46-47, emphasis added. Cited with approval by Kirby P in *Breen v Williams* (1994) 35 NSWLR 522 (the *Silicone Breast Implants Case*) [hereinafter *Breen*].

62 *Blueberry River Indian Band v The Queen in Right of Canada* (1996) 139 DLR (4th) 193, at 209, emphasis in the original. The Federal Court of Appeal's decision in this case was indexed as *Apsassin v The Queen in Right of Canada*, see above n 50.

63 In *R v Audet* (1995) 155 NBR (2d) 369, Ayles J (in dissent) was prepared to categorise the relationship of teacher/student as fiduciary. To the same effect see also the earlier case decision of the British Columbia Supreme Court in *Lyth v Dagg* (1988) 46 CCLT 25. In *Muir v Alberta* (1996) 132 DLR (4th) 695 Viet J, in the Court of Queen's Bench, characterised the relationship between the provincial government and a woman who was wrongfully admitted to a training school for mental

Remedies

A number of factors has been identified above as contributing to a increased use of the fiduciary principle in non-traditional areas, particularly the use of "guidelines", and an increased emphasis on vulnerability. In addition, it appears that in some cases the Court has resorted to the fiduciary principle as a means of either circumventing procedural problems such as statutes of limitations,⁶⁴ or as a means of ensuring a wider range of remedies than would be available for a tort action. Other factors which can be identified include the lack of a pervasive consumer protection act such as the *Trade Practices Act 1974 (Cth)*, and the obvious influence of precedent from the United States.

In *Norberg*, although the plaintiff clearly had an action in battery and assault against a physician who had given her drugs in return for sexual favours, McLachlin J preferred to analyse the relationship in fiduciary terms, as the fiduciary principle more accurately reflected the nature of the wrong done:

I do not find that the doctrines of tort or contract capture the essential nature of the wrong done to the plaintiff. Unquestionably, they do catch aspects of that wrong. But to look at the events which occurred over the course of the relationshipÖfrom 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.⁶⁵

With respect, however, either the facts fit the cause of action, or they do not. A principle does not encompass the incidents of a relationship if it must first be modified or extended to do so.

In deciding that a fiduciary relationship existed between custodial and non-custodial parents in *Frame v Smith*, Wilson J was influenced by the fact that a wider range of remedies would be available than if the action were framed in tort:

[w]hen considering breaches of equitable duty and awarding equitable remedies the court has a wide scope for the exercise of discretion which does not exist in respect of common law causes of action. In the context of breach of fiduciary duty this discretion would allow the court to deny relief to an aggrieved party or grant relief on certain terms if that party's conduct has disabled him or her from full relief Ö There is neither precedent nor historical

defectives and sterilised, as fiduciary. In Australia the appropriate cause of action in both cases would lie in tort.

64 See, for example, *M(K) v M(H)* above n 1.

65 *Norberg* above n 1 at 484.

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basis for the exercise of such a discretion in the case of a common law tort action.⁶⁶

Traditionally, a wide array of remedies has been available for breach of fiduciary duty: these include injunction, an account of profits, constructive trust and equitable compensation. Equitable compensation was, until recently, considered a more flexible and hence more attractive remedy than damages at law for breach of either contract or tort. Notably, although equitable compensation has been available as a remedy for breach of fiduciary duty in Canada for some time, it was not until the decision in *Warman v Dwyer* that any indication was given by the High Court that this remedy is available for breach of fiduciary duty in Australia.⁶⁷

However, recent Canadian cases, in particular the Supreme Court decision in *Canson Enterprises v Broughton*,⁶⁸ have seen the merging of principles of law and equity when it is necessary to achieve what the court considers a just remedy. Thus, in *Canson Enterprises* the majority of the Supreme Court of Canada limited the equitable compensation available in a secret profit case by reference to principles of causation and remoteness of damage.

Canson Enterprises concerned a solicitor who, in effect, acted for both a purchaser and a sub-purchaser (Canson) of land. Canson was unaware of the intermediate purchaser and thought that he was acting directly with the vendor. The solicitor ensured that Canson did not become aware of the first purchaser, nor of the profit which the purchaser made in on-selling the property. Canson constructed a warehouse on the land and it collapsed due to subsidence, caused by the negligence of soil engineers and a pile-driving company. The contractors were sued and held liable, but their finances were such that full damages awarded against them could not be recovered. The appellant brought an action against the solicitor to recover the balance of the loss plus the secret profit and consequential damages. It was conceded that the solicitor acted in breach of his fiduciary duty.

The Supreme Court held unanimously that the solicitor was not liable for the balance of the loss caused by the construction. However, the court was split in its reasons for limiting the solicitor's liability to loss that arose before the intervention of the third parties. La Forest J, with whom Sopinka, Gonthier and Cory JJ concurred, limited liability by importing common law notions of remoteness of damage into equitable compensation. His Honour agreed that the loss would not have occurred "but for" the solicitor's breach of fiduciary duty, but held that the subsequent loss due to subsidence was too remote from the breach. La Forest J based his decision in the fusion of law and equity, and noted that:

66 *Frame v Smith* above n 37 at 105.

67 *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

68 *Canson Enterprises Ltd v Broughton & Co* (1991) 85 DLR (4th) 129 [hereinafter *Canson Enterprises*].

[t]he rubric 'breach of fiduciary duty' has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as "breach of fiduciary duty". It is necessary, instead, to look through the categorization of the wrong as a "breach of fiduciary duty" to the true nature of the wrong, and to move from there to determination of the remedy. The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy.

Ö

My understanding of the effect of the fusion of law and equity is not simply that both systems are administered together by a single structure of courts, but that common law remedies may be awarded for what are purely equitable wrongs, and vice versa, and, in addition, that remedies which have aspects of both systems may be awarded for wrongs that have aspects of both systems.⁶⁹

McLachlin J, with whom Lamer CJC and L'Heureux-Dub   J agreed, denied that damages for breach of fiduciary duty should be measured by analogy to tort and contract.⁷⁰ McLachlin J noted that such a formulation ignores the nature of the fiduciary relationship, and its foundations in trust, rather than the self-interest which underlies negligence and contract.⁷¹ Further, her Honour noted that measures of damages in tort itself can vary, depending on the tort at issue.

Disagreement between members of the Supreme Court of Canada as to the correct measure of equitable compensation for breach of fiduciary duty has continued. In *M(K) v M(H)*, La Forest J⁷² reiterated his view that the principles of law and equity can be merged if it is necessary to achieve a just remedy. His Honour quoted his own judgement in *Canson Enterprises*:

Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced Ö is "the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other". That being so, it would be odd if a different result followed solely on the manner in which one framed an identical claim. What is required is a measure of rationalisation.⁷³

69 Ibid at 136, quoting from the judgment of Lambert JA in *Canson Enterprises Ltd v Broughton & Co* (1989) 61 DLR (4th) 732, at 737-8 (Federal Court of Appeal).

70 A similar conclusion was reached by Stevenson J, who agreed with La Forest J, except on the issue of the "fusion" of common law and equity, and the resulting importation of principles of remoteness into equitable compensation: *ibid* at 165.

71 *Ibid* at 154.

72 Gonthier, Cory and Iacobucci JJ concurred.

73 *M(K) v M(H)* above n1 at 337, quoting *Canson Enterprises*, above n 59, at 152.

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Therefore, as his Honour was of the opinion that the same policy objectives underlie breach of a parent's fiduciary duty and incestuous sexual assault, he denied additional compensation for breach of fiduciary duty, just as in *Canson Enterprises* he had determined that the same policy objectives underlie breach of fiduciary duty and tortious misstatement. McLachlin J again disagreed that the measure of damages for a tort action (in this case assault and battery) and for breach of fiduciary duty should be the same, as the wrong encompassed by the actions in tort and equity may well be different.

Finally, in *Hodgkinson*, a case already noted for the Supreme Court's drawing back from its broad application of fiduciary principles, La Forest J (speaking for the majority) noted that:

Canson held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to achieve a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate.

Ö

Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendant's with harsh damages awards out of all proportion to their actual behaviour. On the contrary, where the common law had developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law.⁷⁴

Therefore, according to La Forest J, in *Canson*, the solicitor's breach was of a "lesser type", so as to make it appropriate to limit the principle of full restitution. It was analogous to an innocent and honest bit of bad advice, rather than tantamount to deceit and theft. The defendant solicitor simply failed to warn his client that the vendors were pocketing a secret profit!⁷⁵

The above cases show an interesting trend. The availability of compensation as a remedy for breach of fiduciary duty was influential in making the action attractive as opposed to common law actions based primarily in tort, and to a lesser extent in contract. Reflecting this, liability for breach of fiduciary duty has been imposed in an increasingly wide array of factual situations, including those in which it is questionable whether any loyalty has been reposed or breached. Conversely, however, the increasing use of the fiduciary principle in novel factual situations has led to a recognition that not all breaches are "equal", and that the quantum of compensation awarded should reflect this fact. Thus, it would now appear

⁷⁴ *Hodgkinson* above n 1, at 201-2.

⁷⁵ *Ibid.*

that unless the circumstances warrant equity's particular concern, the "flexible" remedy of compensation is to be narrowed by reference to the remedies available for the very common law actions that breach of fiduciary duty has begun to displace.

Identifying Fiduciaries - Recent Cases in Australia

Recent years have not, unlike Canada and the United States, seen a burgeoning of fiduciary cases in Australia. In general, the courts show no obvious inclination to widen the fiduciary principle. In the last decade, it appears that there has been a notable decrease in the number of cases where breach of fiduciary obligation has been argued outside of recognised categories. In fact, since 1990 virtually no cases have succeeded on the ground of breach of fiduciary duty. In those cases in which the fiduciary principle was relied on, the court has clearly indicated a reluctance to broaden the traditional fiduciary principle. Further, any reliance on vulnerability as a key indicator of fiduciaries is notably lacking in Australian case law.

Recent cases prior to *Breen v Williams*

On the same day as the New South Wales Court of Appeal heard *Breen v Williams*, that Court also heard arguments of counsel in the case of *Williams v Minister, Aboriginal Land Rights Act 1983*.⁷⁶ *Williams* concerned an application by an Aboriginal plaintiff for damages for negligence, false imprisonment, breach of statutory duty and breach of fiduciary duty against the Minister administering the *Aboriginal Land Rights Act 1983* and the State of New South Wales. The plaintiff argued that she was caused serious psychological and physical disturbance and damage by her wrongful removal, first from her mother and later from an institution which cared for Aboriginal children, to an institution which cared exclusively for white children. These decisions were taken by the then Aborigines Welfare Board, which was constituted under the *Aborigines Protection Act 1909*. The plaintiff was in the custody and control of that Board between 1942 and 1960.

The issue before the Court of Appeal⁷⁷ was whether the plaintiff's action was barred by the *Limitation Act 1969*. Kirby P, with whom Priestly JA agreed, dealt very briefly with the issue. His honour analogised the relationship of the Board and the plaintiff to that of a recognised category of fiduciary relationship, and therefore did not consider more generally the imposition of fiduciary duties:

⁷⁶ *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 [hereinafter *Williams*].

⁷⁷ Despite the fact that *Williams* was heard on the same day as *Breen*, the Court of Appeal was differently constituted. Only Kirby P sat on both benches.

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[t]he Board was in the nature of a statutory guardian of Ms Williams. The relationship of guardian and ward is one of the established fiduciary categories. ... The Board was, in my view, arguably obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her "custody, maintenance and education". I consider that it is distinctly arguable that a person who suffers as a result of a want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for the losses occasioned by want of proper care: cf *Norberg v Weinrib* [1992] 4 WWR 577 at 606; (1992) 92 DLR (4th) 499.⁷⁸

Powell J dissented. He noted, the question of the applicable limitation period aside, that the plaintiff had failed to establish a viable cause of action based upon an alleged breach of fiduciary duty.⁷⁹ His Honour was reluctant to allow actions for breach of fiduciary duty to intrude into areas traditionally the province of tort law:

[f]or my own part, I am content to accept that a person, or body, which accepts under his, or its, control, or takes control of, a person (see eg. *Howard v Jarvis* (1958) 98 C.L.R. 177), or who, or which, adopts the role of a parent, or guardian, in relation to an infant, or other person under some form of disability ... becomes subject to a duty of care to that person or infant, the content of which duty of care will vary with the circumstances. This notwithstanding, I am unable to accept that the law has yet reached that stage where, in a case such as that with which we are now concerned to deal, that duty of care is not to be regarded as having been subsumed within, or as having been overreached by, some broad expansive fiduciary duty of the type contemplated by the Supreme Court of Canada in *KM v HM* (1992) 96 DLR (4th) 289 to which decision Kirby P has referred in his judgment; ...

...

I am unable to see the slightest reason, or justification, for seeking further to extend the range of fiduciary duties cases upon a person, or body, adopting the role of an agent, or guardian, so as to constitute as breaches of fiduciary duty - and thus, as actions constituting an abuse of the relevant relationship - founded upon what were then even if they are not now, the accepted standards of the time - that they were in the best interests of, and for the furtherance of the welfare of, the person fulfilling the role of the child in the relevant relationship.⁸⁰

Powell J further noted that there was no reason of public policy to extend the fiduciary principle to cover, for example, cases involving abuse of a child, as any abuse must also involve an actionable assault.⁸¹

78 *Williams* above n 76 at 511.

79 *Ibid* at 519.

80 *Ibid*.

81 *Ibid*.

Priestly JA specifically noted that although he was broadly in agreement with Kirby P's orders, it was desirable that the plaintiff have the opportunity to argue the substantive issues of the case at trial, as some of the legal propositions at issue "[are] novel [and] require careful consideration in the light of changing social circumstances".⁸²

Breen v Williams

The most obvious example of a recent decision in which Australian courts have declined to follow the lead of their Canadian counterparts is *Breen v Williams* itself. The facts of that case were similar to the 1992 decision of the Supreme Court of Canada in *McInerney v McDonald*, which concerned an application by a patient for access to her medical records.

Briefly, the facts of *Breen v Williams* are as follows. In 1977, Ms Breen had silicone implants inserted in her breasts. After over a decade of problems relating to these implants, Ms Breen had them removed. In 1993, she became involved in a class action in the United States of America against Dow Corning, the company which manufactured the implants. As part of that litigation, Ms Breen was given an option to "opt in" to a settlement. It was a condition of opting in that she do so before 1 December 1994 and that she file with the relevant United States court copies of medical records in support of any claim she wished to make. Rather than securing access to the medical records by an order for discovery of records or by way of letters rogatory, Ms Breen commenced an action in the Supreme Court of New South Wales claiming a declaration that she was entitled to access to any records held by the respondent with respect to herself. Ms Breen relied on contract, tort, fiduciary duty and a common law right to access to support her claim.

Decision of the New South Wales Court of Appeal

In that case the majority rejected a submission that the doctor-patient relationship is one which should be categorised as fiduciary. The majority of the Court of Appeal declined to follow the Canadian decision in *McInerney*, which concerned substantially the same factual situation. Mahoney J denied that the relationship between doctor and patient is generally fiduciary in nature, despite the fact that "the law requires a doctor to act with the utmost good faith and loyalty to his patient and to hold information given to him by the patient in confidence".⁸³ His Honour stated that:

[t]hose obligations [of good faith and loyalty] will, if necessary, be enforced by injunction or the award of damages. But, with respect, it is wrong to infer from such obligations that a more general relationship - trustee or fiduciary - exists. The relationship between a doctor and patient is not, in

82 Ibid at 516.

83 *Breen*, above n 61, at 566.

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this State, "the same relationship as that which exists in equity between" the persons in question: it is not "a fiduciary for trust relationship" as those terms are used in the law of this State.⁸⁴

With respect to the use of the term "fiduciary" his Honour noted: "[t]he apparent disparity in the use of terms of this kind in courts in Canada and elsewhere..."⁸⁵

Meagher J also concluded that the doctor-patient relationship is not of a fiduciary nature so as to generate in a patient a right to inspect the doctor's notes and records. He was, however, willing to concede that the relationship between doctor and patient may be fiduciary in some respect, but that relationship would only generate the usual fiduciary duties not to profit at the patient's expense or to put her or himself in a position of conflict. As to when a fiduciary duty will be imposed, his Honour stated that: "[a] fiduciary relationship usually arises where one dominant partner has some control over the property (or person) of another".⁸⁶

Notably, Meagher J did not mention the question of whether one party is vulnerable to another as being relevant to the question of when fiduciary duties will be imposed on one party to a relationship. Further, his Honour stated, somewhat scathingly, that:

[Canadian cases] illustrate a tendency, which has been commented on elsewhere, to widen the equitable concept of a fiduciary relationship to a point where it is devoid of all reasoning. In other words, when analysing the Canadian jurisprudence in this field, one has the uneasy feeling that the Courts of that country, wishing to find for a plaintiff, but unable to discover any basis in contract, tort or statute for his success, simply assert that he must bear the victor's laurels because his opponent has committed a breach of some fiduciary duty, even if hitherto undiscovered.⁸⁷

Kirby P, on the other hand, found that a fiduciary relationship existed between the two parties in this case. In coming to this conclusion, his Honour applied the decision of the Canadian Supreme Court in *McDonald v McInerney*. Despite following this decision, Kirby P proceeds to state more generally that:

[t]he unifying concept behind the imposition of fiduciary obligations appears to be the secure observance of these fundamental duties in relationships in which it is the role of one party to act in the service and interests of the other who is specially vulnerable to harm if that party does not conform to such duties.⁸⁸

84 Ibid.

85 Ibid.

86 Ibid at 570.

87 Ibid.

88 Ibid at 543.

Kirby P's approach is a synthesis of that of Gibbs CJ and Mason J in *Hospital Products*, being concerned both with purpose and vulnerability. Even so, it is arguably a more restrictive approach than is characteristic of cases from other jurisdictions, as in Kirby's formulation vulnerability is a result of the inherent nature of the relationship under consideration.

The High Court decision

The High Court unanimously rejected Ms Breen's appeal. Before the High Court the appellant mainly based her arguments on three grounds: breach of fiduciary duty, contract, and property in the information contained in the records. It is only intended to discuss the first ground, namely that of breach of fiduciary duty.

In essence, the High Court's views on the nature of the fiduciary principle, and the circumstances in which fiduciary duties will be imposed, has changed little since *Hospital Products*. The Court reiterated its reluctance to outline a "test" or "guidelines". McHugh and Gaudron JJ stated that:

Australian Courts have conscientiously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another. This is because "the term "fiduciary relationship" defies definition."⁸⁹

The Court's reluctance to apply a "test" to determine the existence of fiduciary obligations stems from its recognition that a person may be a fiduciary for some purposes, but not for others:

"[f]iduciary relationships are of different types, carrying fiduciary obligations and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose."⁹⁰

This directly contrasts with the approach of the Supreme Court of Canada, which has been to attempt to determine whether a particular relationship is fiduciary in nature, or whether merely *ad hoc* fiduciary obligations have arisen. The High Court has clearly avoided the pitfalls of attempting to categorise relationships as fiduciary or not. Several members of the Court did, however, identify a number of characteristics which "point towards, but do not determine, the existence of a fiduciary relationship."⁹¹ These include: a relationship of confidence, inequality of bargaining power, trust and confidence, agency, an undertaking by one party to perform a task or fulfil a duty in the interests of another, the scope for a unilateral exercise

89 *Breen*, above n 4 at 284 per Gaudron and McHugh JJ.

90 *Ibid* at 266 per Brennan CJ, quoting Gibbs CJ in *Hospital Products* above n 40 at 69.

91 *Breen*, above n 4 at 284 per Gaudron and McHugh JJ.

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of discretion and dependency or vulnerability.⁹² Notably, vulnerability is only one of a series of factors and is given no more weight than any other indicators. Loyalty, it seems, still remains the cornerstone of the fiduciary principle:

the law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that "[n]o man can serve two masters". Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.⁹³

In a similar vein, Dawson and Toohey JJ noted that:

It has been observed that what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that.⁹⁴

All members of the Court agreed that some aspects of the doctor-patient relationship could be fiduciary in nature. In general, however, the Court restricted this to financial matters, or confidential information. Brennan CJ noted that the relationship of doctor and patient is one of trust, which would cast upon the doctor an onus to prove that any gift received was free of influence.⁹⁵ However, Dr Williams had received no gift. The trust reposed in him by Ms Breen related to the giving of medical treatment. Refusal to grant access to medical records did not deny her any benefit she was entitled to by reason of his position of trust.⁹⁶ Similarly, Dawson and Toohey JJ noted that:

It is conceivable that a doctor may place himself in a position with potential for a conflict of interest - if, for example, the doctor has a financial interest in a hospital or pathology laboratory - so as to give rise to fiduciary obligations. But that is not the case.⁹⁷

Gummow J also confirmed that a fiduciary, including a doctor, would be brought to account for any benefit received from the patient because of conflict or use of knowledge gained from the relationship. However, that was not the case on the facts.⁹⁸

Any fiduciary obligations can only arise from those aspects of the relationship which exhibit the characteristics of a fiduciary relationship: trust, confidence, ascendancy and loyalty, and are confined to the subject matter of that trust, confidence and loyalty. Whilst the first three of these

92 Ibid. See also comments by Brennan CJ at 266.

93 Ibid at 285, per Gaudron and McHugh JJ, footnotes omitted.

94 Ibid at 274, quoting from Finn, P above n 3 at 28.

95 Ibid at 266.

96 Ibid.

97 Ibid at 274.

98 Ibid at 306-7.

are present in some aspects of the doctor-patient relationship, it fails to exhibit the key indicator of the fiduciary principle: loyalty. The Court rejected the view that a doctor has a duty to act with "utmost good faith and loyalty".⁹⁹ The duty to avoid conflict, which flows from loyalty, was seen by the Court as inappropriate to the doctor-patient relationship:

Öit is not possible to regard the doctor-patient relationship as one in which the doctor is under a general duty "to act with utmost good faith and loyalty" to the patient. When a medical practitioner undertakes to treat or advise a patient on a medical matter, "[t]he law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment", not a general duty "to act with the utmost good faith and loyalty".¹⁰⁰

Further, the imposition of a duty of "utmost good faith" was seen by the Court as clearly inappropriate in light of earlier decisions that a doctor is under a duty of care to treat her or his patient with reasonable skill and care.¹⁰¹ The Court denied that the fiduciary principle should be "applied in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs".¹⁰² All members of the Court reiterated that the fiduciary principle in Australia is proscriptive only. Brennan CJ stated that:

In Canada, the Supreme Court has held that the relationship between doctor and patient casts on the doctor a fiduciary duty to provide the patient with access to his or her medical records: *McInerney v McDonald*. But in this respect the notion of a fiduciary duty in Canada does not accord with the law of fiduciary duty as understood in this country. There is simply no fiduciary relationship which gives rise to a duty to give access to or to permit the copying of the respondent's records. There is no relevant subject matter over which the respondent's fiduciary duty extended.¹⁰³

Gummow J also noted that:

[i]t would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.¹⁰⁴

Finally, Gaudron and McHugh JJ stated that:

99 *McInerney v McDonald* (1992) 93 DLR (4th) 415 at 423 per La Forest J.

100 *Breen* above n 4 at 288 per Gaudron and McHugh JJ, footnotes omitted. See also *ibid* at 274 per Dawson and Toohey JJ.

101 *Rogers v Whittaker* (1992) 175 CLR 479.

102 *Breen* above n 4 at 289 per Gaudron and McHugh JJ, quoting Finn, P, above n 3 at 25-26.

103 *Ibid* at 266.

104 *Ibid* at 308.

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[h]owever, Australian courts recognise only proscriptive fiduciary duties. This is not the place to explore the differences between the law of Canada and the law of Australia on this topic. With great respect to the Canadian Courts, however, many cases in that jurisdiction pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their application to those relationships. Further, many of the Canadian cases pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies.¹⁰⁵

Thus, the High Court seems determined to maintain a sharp distinction between fiduciary law and tort law. Where an abuse of loyalty is not at issue, and no conflict has occurred, any action must necessarily be founded in negligence or breach of contract.

Causes of action other than breach of fiduciary duty

Rather than an increase in actions based on breach of fiduciary duty, the last decade has seen an increasing reliance by the Courts on the doctrine of unconscionability.¹⁰⁶ As noted by Mason CJ (as he then was) recent decisions by the courts that the imposition of a remedial constructive trust is available for actions for both breach of confidence and unconscionable conduct¹⁰⁷ have "taken the pressure off the fiduciary relationship as a passport to proprietary relief and have focused attention on other equitable doctrines".¹⁰⁸ In addition, in 1992, the *Trade Practices Act 1974* (Cth) was amended by the insertion of Part IVA, entitled "Unconscionable Conduct". Section 51AA essentially codifies the common law, while s 51AB extends the common law notion of unconscionability, but is limited in context to the supply of goods or services.¹⁰⁹

Of more importance is the impact of s 52 of the *Trade Practices Act*, which is rapidly becoming pervasive in Australian law. The chief attraction of using the *Trade Practices Act*, rather than a common law or equitable action, for example that of breach of fiduciary duty, lies in the wide array of available remedies. As mentioned earlier, it was not even certain until the decision in *Warman* that equitable compensation was available for breach of fiduciary duty in this jurisdiction. The Court in that case gave no indication of whether it would follow its Canadian counterparts and incorporate

105 Ibid at 289.

106 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 and *Taylor v Johnson* (1983) 151 CLR 422. See also *Tarzia v National Australia Bank*, unreported decision of the Federal Court of Australia No 907/95, and *Krambousanos v Jemma Investments*, unreported decision of the Federal Court of Australia No 144/96, as examples of recent actions based on unconscionability.

107 See, for example, *Mushinski v Dodds* (1985) 160 CLR 583.

108 Mason, AF, above n 30 at 248.

109 See, for example, *Qantas Airways v Cameron*, unreported decision of the Federal Court of Australia, No 349/96.

notions of causation and remoteness into the remedy. Given the Court's views on the fiduciary principle in *Breen*, that would seem unlikely.

A comparison between the different causes of action relied on by plaintiffs in Canada and Australia is provided by the recent Canadian decision in *Vita Health Co v Toronto Dominion Bank*.¹¹⁰ The case concerned the liability of a bank for what were essentially misleading statements to a customer. The Toronto-Dominion Bank advised one of its clients (Vita Health) that a third party, also a client of the bank, was creditworthy. At the same time the bank reduced its line of credit to that third party as it was in fact concerned about that party's credit worthiness. Eventually the third party went bankrupt, causing loss to Vita Health. Judgment in the case was awarded to Vita Health on the basis that the bank stood in a fiduciary relationship to them, and had breached that duty. In addition, the court found the bank liable in negligent misrepresentation. In Australia, on the other hand, there is no doubt that such a factual situation would be dealt with under the ambit of s 52 of the *Trade Practices Act*. That Act is commonly used in situations involving misrepresentation and would provide a simpler route to finding liability than to argue that the bank stood as a fiduciary to its customer. In addition, of course, an action based on negligent misstatement would also be available in Australia.

110 *Vita Health Co Ltd v Toronto-Dominion Bank* (1995) 118 DLR (4th) 289 (Manitoba Court of Appeal).

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Conclusion

The fiduciary principle, the doctrine of unconscionability and the *Trade Practices Act* allow for the allocation of liability in a wide variety of circumstances. In Australia, the fiduciary principle remains a mechanism for monitoring the loyalty and trust reposed in a fiduciary. In contrast, in Canada the fiduciary principle not only provides for relief in many situations, but can also form a source of positive obligations, which if not fulfilled will lead to an action for breach of fiduciary duty. It has become more than just a "tort surrogate". In *Breen v Williams* there was no breach of the duty of care owed to a patient. Thus, in the absence of using the fiduciary principle to found a positive obligation on Dr Williams to provide access to medical records, as occurred in *McInerney v McDonald*, there was no cause of action available. The integrity of the traditional fiduciary principle has apparently been maintained. Where loyalty is not at issue, then the appropriate cause of action will lie in tort or contract. Equity will not provide one. The High Court's decision will undoubtedly disappoint many. However, it at least provides a clear indication of the role expected of the fiduciary in Australia. The schism between Australian and Canadian fiduciary law is destined to remain.