The Recent Expansion of Fiduciary Obligation: Common Themes and Future Developments

John D. McCamus
Osogoode Hall Law School of York University, jmccamus@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

Recommended Citation

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.
A lawyer learns of his client's marital problems and consequently and successfully, pursues a romantic liaison with the client's spouse. A businessman enters into negotiations with the owner of a parcel of land with a view to entering into a joint venture to develop this property. The negotiations fail and the businessman, who has correctly inferred that the neighbouring property must be similarly valuable, acquires the neighbouring property. A banker encourages and arranges for loans to a customer to purchase shares of a target company with a view to obtaining control, mistakenly unaware that another department of the bank is assisting another shareholder engaged in a similar exercise.

Prior to a reading of the recent case law on fiduciary obligation, one wonders how many members of the profession would have quickly concluded that the one thing these three individuals had in common was that they had all engaged in a breach of fiduciary duty. The recent and remarkable expansion of fiduciary obligation was recently surveyed in a Law Society of Upper Canada symposium, Fiduciary Duties - A Matter of Trust (October 1986 - hereinafter "Symposium"). The present paper was originally presented as an attempt to develop and speculate upon themes common to the Symposium papers. The papers provided accounts of the recent use of the fiduciary concept in such contexts as real estate transactions, corporate law, employment law, partnership and professional relationships. One common theme that clearly emerged from the Symposium papers is that the fiduciary concept is being asked to do a great deal of work in a broad range of factual situations. Indeed, the remarkable growth of fiduciary obligation in the law reports has become one of the notable features of our jurisprudence and has, as one would expect, inspired a substantial law review literature and, indeed, two recent texts devoted exclusively to this subject.

It may reasonably be asked, of course, whether the fiduciary concept is one which can bear this workload without sustaining a work-related injury of some sort. Although, as I shall suggest below, the extension of the concept to new and
intriguingly different fact situations should not be a cause for alarm, there is some evidence in the case law that the concept is drifting away from its moorings from time to time. As it is my view that this latter development does bring with it the risk of some confusion, I propose to draw attention to some basic ideas concerning the fiduciary obligation and then, having briefly explored the question of its extended application, offer a few brief comments concerning remedial issues.

The Fiduciary Concept

In very general and perhaps misleadingly simple terms, it may be said that the law of fiduciary obligations is a body of equitable doctrine arising from Equity's concern with equitable fraud. Breaches of duty thus lead to equitable remedies only and, more particularly, to the constructive trust, and equitable advantages of these have a proprietary nature and, apart from the usual advantages of proprietary remedies, carry with them the advantage that the equitable rules relating to the tracing of property can be deployed by the plaintiff in identifying the property in the hands of the defendant that is subject to the remedial order.

Although I confess that my reading of the Symposium papers has shaken my confidence to some extent, I persist in the belief that the idea underlying fiduciary obligation is a relatively straightforward one. In City of Toronto v. Bowes, Chancellor Blake expressed the central point in the following terms:

"The settled rule is, that he who is entrusted with the business of others cannot be allowed to make such business an object of interest to himself."

The law of fiduciary obligation is but one of the subjects of the law of equity that have been brought together with the common law of quasi-contract to form the modern law of restitution. Thus, it is argued by scholars of the law of restitution that fiduciary obligation is one of the many areas of common law and equity that may be properly characterized as applications of the broad, underlying principle of the law of restitution that one who has been unjustly enriched at the expense of another is required to make restitution to the other. Further, the law of fiduciary obligation is said to manifest another broad, equitable principle which is also thought to be an organizing theme of the law of restitution, that is that wrongdoers shall not be permitted to profit from their wrongdoing. Breach of fiduciary obligation constitutes the wrongdoing. The remedies of constructive trust and accounting of profits are available to remove profits made by the faithless fiduciary.

The general framework of analysis in the fiduciary case law also seems reasonably straightforward. Laskin J., as he then was, in Can. Aero Service Ltd. v. O'Malley, identified the "four issues that arise for consideration in this area" as first, the determination that the relationship between the parties is fiduciary in nature; second, the determination of the nature of the duty or duties that arise from the particular relationship; third, the determination of whether a particular duty has been breached; and fourth, the determination of the extent of liability resulting from the breach in question. We might imagine that Chancellor Blake would have added some flesh to this useful skeleton by suggesting that where there exists a relationship in which one party is entrusted with the business of another, the first party is under a duty not to place his own interest above that of the other and that where the first party does so, any profit secured from breach of that duty will be recoverable by the second party.

As always, of course, the difficulty lies in applying these broad, general principles to particular fact situations. More specifically, some confusion arises in the determination that a particular relationship has a fiduciary character and in the definition of the scope of the duties appropriate to that particular relationship. Many, I fear, attempt to analyze these issues by simply asking whether the particular defendant holds an office which is generally recognized to be of a fiduciary nature and, if so, by assuming that the fiduciary has essentially all the obligations of an express trustee. On both counts, this analysis is likely to lead to error.

With respect to the first issue, the identification of a fiduciary relationship, it is traditional to begin, as Scott does in the passage referred to by Crawford by asking "Who is a fiduciary?" and then by listing the typical fiduciary relationships such as trustee-beneficiary, principal-agent, guardian-ward, executor-legatees, solicitor-client, directors-corporation, and so on. Parenthetically, we should observe that the traditional list would not have included employees, banks or negotiating co-venturers. This shopping list approach to the definition of fiduciary obligation may, however, mislead. Although Scott himself would commit no such error, a listing of this kind may be taken to suggest that fiduciary obligation adheres principally, if not exclusively, to the holders of certain important offices. Accordingly, it may commonly be thought that the trick in determining the extension of the fiduciary concept to new fact situations is to identify offices which, although not yet considered fiduciary, are of sufficient importance to bring them within the fiduciary net. Such an approach may obscure from view and broad range of possible...
applications of fiduciary doctrine.

Thus, two of the Symposium papers 8 suggest that although the concept of fiduciary obligation has now been extended to employees, it is likely to be restricted in its application to senior management personnel. In this, these authors are in good company. 9 On this basis, however, we might be tempted to assume, for example, that an errand boy would not be considered to have fiduciary obligations. And yet, in Re Coomber; Coomber v. Coomber, 10 Fletcher Moulton L.J. offered the following observation:

"Fiduciary relations are of many different types; they extend from a relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him."

The errand boy illustration is perhaps far-fetched. The first errand boy who breaches his fiduciary obligation by purchasing a winning lottery ticket with the change may well give rise to earnest consideration of Re Coomber. In any event, the list of employees who may be subject to fiduciary obligation is not likely to be constrained to senior management employees, and it is therefore not surprising that one of the cases referred to in the Roeckbuck paper 11 relates to the activities of a hearing-aid specialist at a department store.

The correct answer to the question "Who is a fiduciary?" is, then, "anyone". If anyone can be a fiduciary, however, it is also obvious that not everyone is, not all the time. The principal identifying characteristic of the fiduciary is that referred to above, the fiduciary is one who has undertaken to act on behalf of another. 12 More than this, there are a number of recurring features of fiduciary relationships. The fiduciary is likely to either have stewardship of some of the assets of the person to whom the duty is owed or will hold an office in which there are uniquely-available opportunities for self-interested activity or, the relationship is likely to be one in which the fiduciary has considerable authority or influence over the individual to whom the duty is owed. In the absence of such factors, it is unlikely that a fiduciary relationship will be found, but as it is difficult to be more precise about the nature of fiduciary obligation than this, it is not surprising that the list of applications of as broad and open-textured a principle as this continues to grow in length.

Once one has identified the existence of the relationship, the next and equally important question, as Laskin J. stressed in Can. Aero, 13 is the definition of the scope of the duty. The fiduciary duties of an errand boy are obviously not as intense as those of a lawyer or a director of a corporation.

As Crawford points out in his Symposium paper 14, the most obvious starting point for this analysis is the actual undertaking of the fiduciary and the expectations of the other party which flow therefrom. There appear to be cases, however, where Courts are reluctant to find that a fiduciary relationship exists because of an assumption that a broadly-based duty to account for profits will necessarily accompany it. Arguably, Midcon Oil & Gas Ltd. v. New British Dominion Oil Co., 15 discussed by Goldenberg in his Symposium paper 16 is a case of that kind. In that case, two companies developed a natural gas field as a joint venture, one of the companies assuming responsibility for operating the field. In order to improve marketing prospects, the operator promoted a company to manufacture chemical fertilizers which would become a major consumer of the natural gas. The inactive partner sought one-half of the operator's share of the fertilizer company on the ground that the operator had exploited its fiduciary position to profit from promotion of the fertilizer business. A majority of the Supreme Court of Canada dismissed the claim on the ground that no fiduciary obligation existed. Rand J. dissented on the basis that the relationship did have a fiduciary character. On this point, surely, Rand J. had the better side of the argument. Reasonable jurists could no doubt differ, however, on the more difficult point as to whether the fiduciary duty thereby created extended to embrace an opportunity of the kind exploited by the defendant.

In summary, then, it is in the nature of the fiduciary obligation concept that it will continue to find new application in novel factual situations. Further, to the extent that its appetite for novel application is a source of anxiety, the anxiety may be reduced by keeping clearly in mind the point that the definition of the scope of the duty is a separate exercise which should provide a check on over-breadth of application of the concept.

Testing the Limits of Fiduciary Obligation

If in general terms, then, the remarkable frequency of fiduciary analysis in the law reports in recent years ought not to be a source of concern, it is nonetheless my impression from reading the Symposium papers that the concept is indeed being overworked to some extent in the recent case law. Fiduciary obligation may well be being asked to do too much in the sense that it is being utilized to analyze situations for which it is not well suited. A number of the factual situations described in the various papers appear to me to be much more amenable to analysis in contract or as breach of confidence or
negligence cases in tort.

A partial explanation for this phenomenon would appear to be that fiduciary obligation is being used as a device to fill in gaps or remedy deficiencies in these other areas of the law. In the cases discussed by Roebuck, for example, there appear to be two traditional rules with which the Courts are no longer completely satisfied. The “customer list” rule is now evidently thought to be too narrow a constraint on competition by former employees, at least as far as senior employees are concerned. Secondly, the rule that ineffective, non-competition clauses are struck down in their entirety appears to be considered unattractive. In each case, we now have cases imposing fiduciary obligations in such fashion as to undermine or do an “end run” around these traditional rules. If reform is desirable, and it may well be, it would surely be preferable to confront more directly the policy considerations underlying the traditional rules.

Similarly, the law of contract has had some difficulty in dealing effectively with pre-contractual situations. Unlike American law, Anglo-Canadian law has traditionally not recognized a duty to bargain in good faith. In at least one recent case, a duty was in fact imposed on the somewhat doubtful theory that a fiduciary relationship was in place prior to the entering into of a contract of employment. The theory is doubtful inasmuch as it seems contrary to common sense to construe the relationship of negotiating parties as one in which one party is in fact acting on behalf of the other. In another case dealing with a pre-contractual situation, an Ontario Court imposed fiduciary obligations with respect to confidential information disclosed in the context of such negotiations. Again, leaving aside what may arguably be the rather special circumstances of that case, it seems very artificial to construe negotiating parties as having such a relationship. Accordingly, the misuse of confidential information in such a context would seem much more suitably dealt with by the emerging tort of breach of confidence. The breach of confidence liability requires no special relationship of a fiduciary character and is accordingly better suited to deal with situations in which the parties may understandably believe themselves to be dealing with each other at arm’s length.

The application of the fiduciary concept to corporations and partnerships gives rise to somewhat similar concerns. The interesting issue raised in two recent cases discussed in these papers, one relating to a law firm and the other to a bank, is whether the firm or bank will be liable for breach of a fiduciary duty where the breach rests on the conduct of a natural person who was unaware of the relationship developed by another natural person employed by that firm or bank. The question in such cases is whether, even though neither of the natural persons may be in breach of a fiduciary obligation, the corporation or firm is liable on the view that the combined knowledge and combined conduct of the two natural persons constitutes a failure to act in a manner consistent with a fiduciary obligation of the corporation or firm to its customer or client. In Davey v. Woolley, Hames, Dale & Dingwall the Ontario Court of Appeal clearly indicated that it would not permit law firms to suffer schizophrenia, that the firm itself would be saddled with the collective knowledge and actions of individual members of the firm. This result seems particularly defensible in the context of law firms where the potential for divided loyalties is a well understood problem and something which firms typically attempt to prevent through a number of administrative means, as well they should. On the other hand, the Standard Investments Ltd. v. C.I.B.C. case, discussed by Crawford, suggests that an approach of this kind may very considerably complicate life for a large, bureaucratic organization such as a bank. In Standard Investments, the Ontario Court of Appeal imposed liability on the bank on the theory that the two natural persons in question were both of sufficient status, Harrison being the bank’s Chairman and Wadsworth its Chief Executive Officer, to constitute “directing minds and wills” of the bank and that the bank would be presumed to act as a fiduciary and would have attributed to it the cumulative knowledge and actions of the two individuals.

The facts of the Standard Investments case are rather unusual inasmuch as very senior individuals, both active in the same area of corporate responsibility, had apparently failed to discuss their respective involvements in the related and very important transactions which were held to cumulatively amount to a breach of the bank’s fiduciary obligation to the plaintiffs. One wonders, however, whether fiduciary analysis would fit so appropriately into these fact situations if the officials in question had less proximity and less reason to be knowledgeable of each other’s actions than in this case. If neither of the natural persons involved had any reason to believe themselves to be in breach of fiduciary duties, it can at least be said that the application of the rule will be surprising to the individuals involved and will operate very differently than it does in its traditional context. Indeed, if Mr. Wadsworth has done nothing that would lead us to describe him as a faithless fiduciary, one wonders whether we have adopted the right analytical model when we implicate him in a breach of fiduciary duty to the bank’s client. To be sure, the test for breach of fiduciary obligation should be objective rather than subjective. Further, there is a persistent line of analysis in the fiduciary case law arguing for a strict standard of liability either because of the need for deterrence or because of the evidentiary difficulties encountered in establishing breach of...
fiduciary obligation. Nonetheless, fiduciary analysis is in its least persuasive role when it imposes liabilities that individuals acting in good faith had no reason to anticipate.

Again, would it not be possible to analyze this type of fact situation in contract or tort? What kind of advice did acting in good faith had no reason to anticipate.

Further, it is not obvious that the usual remedies for breach of fiduciary duty would fit appropriately into this context. In fact, the plaintiff recovered only its lost investment. However, if the situation is accurately characterized as one of breach of fiduciary obligation, it may be asked whether the bank should have been required to disclose its "ill-gotten" gains. Should Mr. Black, a director of the bank - assuming he had known of or assisted in the breach - have had to disgorge his profit as the successful purchaser of Crown Trust? Certainly, these outcomes are arguable on traditional fiduciary theory.

The migration of fiduciary duties of this kind into the functioning of large, financial intermediaries, particularly as we approach the possibility of greater integration in this sector of the economy, appears to be a potential source of excitement in the law reports. As Crawford points out, it is not at all obvious that the highest of so-called Chinese walls could solve the Standard Investments problem. On the other hand, as Professor Ziegel has argued, a careful reading of the Standard Investments case itself suggests that the Ontario Court of Appeal has left open the possibility that a Chinese wall defence may be available on appropriate facts.

Another situation in which liabilities have been imposed on parties acting in good faith and on the assumption that they are not in breach of fiduciary duties arises in the context of duties imposed on strangers to the fiduciary relationship. Crawford 31 provides us with the example of the recent imposition of the constructive trust remedy on banks who follow instructions from faithless fiduciaries by, for example, honouring a cheque drawn on a trust account. There has been some suggestion in the English case law that the receiving bank may be saddled with constructive notice of the fiduciary's breach of duty and be required to account for the money disbursed, even though the bank may not have benefited in any meaningful sense from the transaction. Crawford's lack of enthusiasm for the imposition of such liabilities is mirrored in more recent English case law and it is difficult to resist his conclusion that the broad scope of the duty imposed on a bank to make inquiries in suspicious circumstances suggested in these cases is better defined by the law of negligence. There is no suggestion in these cases that the bank is itself a fiduciary, of course, but again, obligations to account that may be very difficult for the ordinary person acting in good faith to anticipate are imposed on grounds of breach of trust.

In summary, then, there appear to be a number of situations in which fiduciary obligation analysis has supplanted more familiar doctrines of contract and tort and, in my view at least, it is not always apparent that clarity of analysis has been fostered by this development. Further, it appears that fiduciary obligation is being used to some extent as a surreptitious device for correcting and reforming existing doctrine. While one would not wish to be seen in the way of progressive evolution of common law doctrine, one may also ask whether a more direct attack on the deficiencies of existing doctrine might be a more satisfactory manner of accomplishing this objective.

Remedial Issues

A second major reason underlying the remarkable growth of the fiduciary concept relates to remedial issues. A number of remedial advantages flow from application of fiduciary analysis, the most important of which, of course, is that the constructive trust remedy, when available, holds forth the possibility of proprietary relief. This is coupled with the fact, referred to by Crawford, that English jurisprudence has to some extent purported to link the constructive trust exclusively with fiduciary obligation. This, in a case where proprietary relief is, for some reason, a particularly desirable solution to the problem at hand, there will be an understandable temptation to "find" that the relationship between the parties is of a fiduciary character.

Perhaps the best, recent, English illustration of this creation of what might be referred to as "instant fiduciaries" is to be found in Chase-Manhattan Bank v. Israel-British Bank. In that case, the plaintiff mistakenly paid the defendant for a second time an amount in excess of $2,000,000 U.S., not realizing that the payment had already been made. Shortly thereafter, the defendant became insolvent and it was suggested that the plaintiff should rank with all of the other unsecured creditors. Although there is obviously little or no basis on such facts to find the existence of a fiduciary relationship of
the traditional kind, Goulding J. held that the defendant bank held the second payment as a fiduciary on the terms of a constructive trust and accordingly, the plaintiff was allowed to lift the second payment out of the insolvent's estate. Under traditional analysis, it seems rather likely that the plaintiff would have been left to the in personam claim historically available in quasi-contract (or, in the modern terminology, restitution) to recover moneys paid under a mistake of fact. The obvious unfairness in subjecting the plaintiff's second payment to the rigours of the insolvency inspired a rather expanded notion of the nature of fiduciary obligation.

As expert testimony in Chase-Manhattan itself indicated, American law is in this respect very different from English law. The American view, well reflected in the Restatement of Restitution, is that the constructive trust is merely a remedy available in cases of "unjust enrichment" which is not at all restricted to cases of fiduciary obligation. Thus, in American law, there would be no reason why a thief could not be held to hold stolen property as a constructive trustee, even though there would be no basis whatsoever for suggesting the existence of a fiduciary relationship and American authority so holds. It is Crawford's view that this restricted aspect of English law, whatever its current status in England, has never been a part of Canadian law on this point. What is in any event readily beyond doubt is that The Supreme Court of Canada in Pettkus v. Becker explicitly adopted the American theory of constructive trust and made the remedy available in circumstances in which no suggestion of fiduciary obligation was present. Accordingly, there is now plainly no need to invent "instant fiduciaries" in order to make the constructive trust remedy available and accordingly, one hopes that this particular source of pressure on the growth of fiduciary obligation will dissipate.

Indeed, the adoption of the American or unjust enrichment theory of constructive trust in Pettkus should facilitate a more far-reaching reassessment of the equitable remedies available in restitutionary contexts, including the fiduciary context. For example, once one accepts the view that constructive trust is merely a proprietary remedy available in some restitution cases, one is led to consider what kinds of circumstances might suggest that proprietary relief is a more suitable remedy than in personam relief. In the fiduciary context, for example, the old learning from Lister & Co. v. Stubbs is that a distinction is to be drawn between bribes and other kinds of property acquired by fiduciaries and that proprietary relief should not be available with respect to the former. Although the employee accepting bribes is subject to an accounting for their value to his employer, the Court reasoned that the bribes were not accepted by the employee as an agent for the employer and accordingly, proprietary relief would not be available. This line of reasoning leads to the anomalous result that the remedies available against an employee accepting bribes in breach of fiduciary obligation are less vigorous than those available in other cases of default. The unjust enrichment explanation of constructive trust makes it quite unnecessary to find that ill-gotten gains were acquired "on behalf of" the principal in the Lister v. Stubbs sense and provides a basis for its overruling.

If Pettkus v. Becker provides us with a basis for reconsidering Lister v. Stubbs, it may also serve as a foundation for a more comprehensive review of the relationship between proprietary and in personam relief in the law of restitution. This is a subject for a larger paper, but in the present context it may at least be noted that the Chase-Manhattan Bank case itself suggests one potentially fruitful idea. Proprietary relief would seem to be particularly appropriate in situations in which the plaintiff is, as in that case, an involuntary creditor. The use of constructive trust in the fiduciary context to strip the faithless fiduciary of all profits generated by him is also suggestive of a broader principle. The trust remedy provides a disincentive for conduct viewed as particularly wrongful. To the extent that the general question of the relationship of the two different kinds of remedies is provoked by Pettkus, this may well have implications for the use of constructive trust and accounting remedies in the fiduciary context.

It seems likely that greater familiarity with the use of equitable proprietary relief in the fiduciary context and elsewhere will also lead to some reshaping of the equitable tracing rules. As Jessel M.R. pointed out in Re Hallett's Estate; Knatchbull v. Hallett, "... the moment you establish the fiduciary relation, the modern rules of Equity, as regards follow trust money, apply." Again, this is a subject for a much larger paper, but it will be recalled in general terms that common law tracing rules rest on a rather physical conception of the notion of property. That is to say, common law would incline to the tracing of physical assets, be they goods or banknotes as long as they, or a substitute for the original thing, could still be seen and identified. Thus, it is generally believed, although the point remains a contentious one, that one cannot trace at common law moneys which have been paid into a bank account and mixed with other moneys. Equity, on the other hand, clearly permitted tracing into mixed funds whether the mixture resulted from the fiduciary mixing his own money with that of the plaintiff or mixing the money of a number of innocent beneficiaries in the same account. Equity established a set of presumptions to untangle such mixtures. The most notorious of these is the so-called rule in Clayton's Case which provides that in the case of a mixed account
from which a series of disbursements has been made, the burden of the disbursements will be allocated to the various beneficiaries on a “first in, first out” basis. Many have observed and remarked upon the randomness and arbitrariness of the results achieved in this fashion.48 Accordingly, a recent decision of the Ontario Court of Appeal in O.S.C. v. Greymac Credit Corp.49 in which the Court held that it would not apply the rule is very much to be welcomed. In an elegant and learned opinion, Morden J.A. adopted an approach which would visit the various depredations made on the fund on a pro-rata basis to the beneficiaries, calculated on the basis of their respective contributions. Hopefully, the shift in Canadian jurisprudence away from the English model to the unjust enrichment model will facilitate a rethinking of this area more generally.

Finally, I note that there have been one or two suggestions in the recent case law to the general effect that damages may be an appropriate remedy in the context of fiduciary obligation. In Szrfer v. Chodos,50 for example, the plaintiff client was held entitled to recover special and general damages flowing from the adulterous affair the defendant lawyer conducted with the plaintiff’s wife, in breach of his fiduciary obligation to the plaintiff. Although there is more ancient support for the sua sponte allocation of damages as a remedy for breaches of fiduciary duty,51 they do not appear to have been awarded with any frequency. Presumably, this is because in many cases where compensation for loss appears appropriate, damages in tort or contract would be an available alternative. If damages in the sense of compensation for consequential loss are to be considered a readily available remedy for breach of fiduciary duty, this would represent a substantial change in fiduciary law and should, I would suggest, involve us in some rethinking of the nature of fiduciary obligation. At the present time, the nature of the duty is essentially one requiring the defendant not to profit from breaches of fiduciary duty. To hold that the fiduciary is also liable for all of the consequential damages that may flow from his failure to perform the fiduciary obligation is, in effect, to convert fiduciary obligation into a contractual undertaking to provide faithful fiduciary service. Perhaps it would conduce to clearer thinking to restrict this development to situations where such contractual arrangements are clearly present in the actual relationship of the parties. For present purposes, however, and without any intention of trying to discourage creative evolution of fiduciary doctrine, it is sufficient to note that a shift to damages liability would involve a significant change in the remedial consequences of breach of duty and this should, in turn, lead us to give careful consideration to the nature of the duty imposed. It is one thing to insist that ill-gotten gains be disgorged or accounted for, quite another to hold that the defendant is responsible for all consequential loss flowing from a breach of duty. We set very high standards for fiduciaries. While such standards may be appropriate where the liability is profit recovery, they may not be if liability for consequential loss is to be imposed. At the very least, it would seem that some breaches of fiduciary duty should not have this consequence. In short, broad acceptance of a damages remedy should, in my view, rest upon some fundamental rethinking about the nature of fiduciary obligation.

In summary, then, the remarkable growth of fiduciary doctrine reported on in these papers seems consistent with its historical tradition and its open-textured structure. As Arnup J.A. said in Laskin v. Bache and Co.,52 “. . . the category of cases in which fiduciary duties and obligations arise . . . is no more ‘closed’ than the categories of negligence at common law.” No doubt, it is realistic to expect that both fiduciary obligation and negligence will expand to cover new types of commercial and other activity in years to come. My own wishful thinking with respect to fiduciary obligation is that it would tend to clear thinking if fiduciary obligation were restricted to relationships of the traditional fiduciary character, rather than having its boundaries essentially extended so as to encompass breaches of trust and/or negligence that might be more straightforwardly addressed by revision to the law of contract or the law of tort. Further, I very much hope that the adoption of the American view of constructive trust in Pettkus v. Becker53 will be seen to provide an appropriate basis for reconsidering a number of remedial issues relating both to fiduciary obligation and to the law of restitution more generally. A review of Canadian case law on these subjects suggests that this is a problem that our Courts are well equipped to tackle.

Endnotes


2P.D. Finn, Fiduciary Obligations (The Lawbook Company; Sydney: 1977); J.C. Shepherd, The Law of Fiduciaries (Carswell Co., Toronto: 1981). As well, the standard texts on trust, restitution and equity, which have increased in number in recent years, contain extensive discussions of this subject.

3(1854), 4 Gr. 49 at p. 503.

I should add that this problem, and its solution, is briefly discussed by Bradley Crawford in his Symposium paper, "Bankers’ Fiduciary Duties and Negligence", at pp. 1-5. I wish to simply reinforce and expand a bit on his discussion. I should add that my own views on this subject have been shaped by my experience as a student listening to Bradley Crawford’s lectures on the law of restitution at the University of Toronto and, as well, by my discussions with Peter Maddaugh, of the Ontario Bar, with whom I have been collaborating on various restitutionary projects over the years, and whose unpublished materials on fiduciary obligation are an important source of my inspiration on this subject.

The learned authors of Goff and Jones on Restitution make a similar suggestion. See, Goff and Jones, supra, note 4 at p. 632.

[1911] 1 Ch. 723 (C.A.) at p. 728.


City of Toronto v. Bowes, supra, note 3.

Supra, note 5.

Supra, note 6, at p. 1.04.


"Fiduciary Duties of Co-venturers and Partners", at pp. 3.07-3.08.

Supra, note 8.

Id., at pp. 2.10-2.11, referring to Hudson’s Bay Company v. McClocklin, supra, note 11.


See, generally, E.P. Belobaba, “Good Faith in Canadian Contract Law”, L.S.U.C., Special Lectures, 1985, 73. References to the leading American law review articles on this subject are to be found in note 2, Belobaba, supra.


See, Int. Corona Resources Ltd. v. Lae Minerals Ltd., note 1.

I appreciate that the categorization of breach of confidence as tortious is controversial. Nothing turns on this for present purposes inasmuch as it is generally accepted that breach of confidence and breach of fiduciary obligation are distinguishable bases of liability: see, e.g., R.G. Hammond, "Is Breach of Confidence Properly Analysed in Fiduciary Terms?" (1979), 25 McGill L.J. 244.


Supra, note 6, at pp. 1.00-1.09.


This point is made by R.P. Austin, “The Corporate Fiduciary: Standard Investments Ltd. v. Canadian Imperial Bank of Commerce” (1986), 12 C.B.L.J. 96.

Supra, note 6, at p. 1.11.


Supra, note 6, pp. 1.14-1.16.


Supra, note 6, at pp. 1.14-1.16.

See, Belmont Finance Corp. v. Williams Furniture, [1979] Ch. 250, [1979] 1 All E.R. 118 (C.A.); Baden, Delvaux and Locut v. Société Général pour Favoriser le Développement du Commerce et de l’Industrie en France S.A., [1983] B.C.L.C. 325. For an illuminating discussion of this complicated area of the case law, see Charles Harpum, "The Stranger as Constructive Trustee" (1986), 102 L.Q.R. 114, 267, in which the Selangor decision is explained and criticized on the basis that it improperly introduces into the analysis of problems of “knowing assistance” of a breach of fiduciary duty, the test of constructive knowledge which is exclusively appropriate to the cases dealing with the knowing receipt of trust property.


Supra, note 6, at p. 1.03.


American Law Institute, Restatement of the Law of Restitution (1937).

Supra, note 6, at p. 1.03.


(1899), 45 Ch. D. 1.

(1880), 13 Ch. D. 696 at p. 710 (C.A.).

See, generally, Goff and Jones, supra, note 4, ch. 2.

Id., at pp. 63-69, in which an argument for a more expansive view of the scope of tracing at common law is put forward.


Supra, note 43.