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FIDUCIARIES: WHEN IS SELF-DENIAL OBLIGATORY?

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A highly paid agent sets out to undermine his principal's business. A doctor wangles sex-for-drugs favours from a patient. An advisor offers self-interested advice to his client. A father engages in an incestuous relationship with his child. In each case the perpetrator is clearly a wrongdoer and the law must somehow respond. But *what* is the legal wrong and *how* should the law respond?

The thesis advanced here is that it is too easy—and is ultimately unsatisfactory—to meet any justifiable moral outrage simply by tagging these people as fiduciaries and then applying against them the full remedial force of fiduciary law.[1] If the law is to be applied consistently, predictably and efficiently, then categorisation of fact situations as illustrating particular wrongs and as meriting particular remedies must be more discriminating. There are real choices to be made in deciding how to develop this area of the law, choices which can be seen in operation in different forms in different Commonwealth jurisdictions. Albeit only in outline form, this article puts the case for a very tightly defined notion of fiduciary obligation and an equally restrictive view of the appropriate remedial response. It points to several issues which appear to work against precision in fiduciary law, and advocates a strict response. It concludes by attempting to pinpoint what appears to be critical in identifying fiduciaries.[2]

I. PRECISION IN LEGAL CLASSIFICATION AND LEGAL ANALYSIS

The drive for better remedies provides much of the modern impetus for a loose—and purely instrumental—use of the fiduciary tag. The primary objective in attaching a fiduciary label is often to obtain the advantages of a proprietary claim (via a constructive trust);[3] other incentives include the

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1 As various judges have: see *USSC* v. *Hospital Products International Ltd.* [1982] 2 N.S.W.R. 766, rev'd (1984) 156 C.L.R. 41; *Norberg* v. *Wynrib* (1992) 92 D.L.R. (4th) 449; *Hodgkinson* v. *Simms* (1994) 117 D.L.R. (4th) 161; *M (K)* v. *M (H)* (1992) 96 D.L.R. (4th) 289.

2 Much has been written on fiduciaries. See especially A. Scott (1949) 37 Cal. L.R. 539; L.S. Sealy [1962] C.L.J. 69; J.C. Shephered (1981) 97 L.Q.R. 51; T. Frankel (1983) 71 Cal. L.R. 795; P.D. Finn, 'The Fiduciary Principle" in T. G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto 1989), ch. 1; R. Flannigan (1989) 9 O.J.L.S. 285; Hon. J. R. M. Gautreau (1989) 68 Can. Bar Rev. 1.

3 *E.g. Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74, *Re Stapylton Fletcher Ltd. (in admin. rec.)* [1994] 1 W.L.R. 1181, and *Daly* v. *Sydney Stock Exchange* (1986) 160 C.L.R. 371, all cases where the proprietary claim failed.

avoidance of restrictive limitation periods[4] and (more questionably) the avoidance of contractual rules on remoteness of damage.[5] The expansion necessarily inherent in this drive for better remedies does little to enhance the doctrinal purity of fiduciary law. One response to this is to concede the logical flaws in adopting a purely instrumental fiduciary tag, but to claim the desired remedies anyway by rejecting the notion of a necessary link between the fiduciary tag and any particular remedy. This approach assumes that the common law simply provides a vast remedial menu from which it is possible to select the most appropriate response to any given set of facts.[6]

However, common sense suggests that no legal system can survive, as a system, on such a footing. Before long generalised rules must develop indicating which behaviours will be punished and what form the punishment will take. Moreover, every jurisprudential theory recognises the intimate link between rights and remedies: if a remedy is altered, then the right, too, is changed. If currently-styled "fiduciary remedies" were made available for some (or all) non-fiduciary wrongs, then of necessity this means that the underpinning right has metamorphosed. Taken to extremes, such a meta-fiduciary law has the potential to swallow whole much of contract and tort law.[7] However, this could happen only if the legal system restyled contract and tort obligations to focus on prophylactically ensuring the affirmative advancement of plaintiffs' interests, rather than simply ensuring their protection from harm. Such a transition is not impossible, but it goes far beyond what is commonly intended by the advocates of a liberal use of the common law's "remedial menu".

In short, a legal system entails that rights and remedies can be subjected to some form of classification: rights only mean something in terms of the remedies they attract.[8] The difficulties in defining that system, including fiduciary obligations and their associated remedies, cannot be evaded by claiming the remedies where the rights do not exist.

II. Precision in "Fiduciary" Terminology

Loose terminology is a further cause of imprecision in fiduciary law. At its worst, it engenders the assumption that any breach of obligation by a

4 *E.g. Nocton* v. *Lord Ashburton* [1914] A.C. 932.

5 *E.g. Hodgkinson* v. *Simms* (1994) 117 D.L.R. (4th) 161.

6 *E.g. Aquaculture Corp.* v. *New Zealand Green Mussel Co. Ltd.* [1990] 3 N.Z.L.R. 299, 301; *Butler* v. *Countrywide Finance Ltd.* [1993] 3 N.Z.L.R. 623, 631 *per* Hammond J. For criticism, see the references cited in J. Geltzer, "Patterns of Fusion" in P. Birks (ed.), *The Classification of Obligations* (Oxford 1997) ("*Classification*") ch. 7, at p. 160 n. 14. But also see E.J. Weinrib, "The Juridical Classification of Obligations" *ibid*., at ch. 2, pp. 48–51, advocating a different and more limited version of the "remedial menu", justified simply on the basis of corrective justice.

7 J.D. McCamus (1997) 28 Can. Bus. L.J. 107, 115.

8 See J. Stapleton, "A New 'Seascape' for Obligations: Reclassification on the Basis of Measure of Damages' in *Classification* (n. 6 above), ch. 8.

fiduciary (whether a common law or an equitable obligation) is a breach of fiduciary obligation. The carelessly accepted inference is then that preferential ("fiduciary") remedies are available. At least where the common law is concerned, such loose usage is now explicitly decried:[9] a negligent fiduciary commits a tort, not a breach of fiduciary obligation;[10] fraud, even when committed by a trustee, is a tort, not a breach of trust;[11] an obligation to perform a contractual undertaking honestly and conscientiously does not imply that the obligation is fiduciary;[12] finally, an obligation to make restitution is not fiduciary.[13]

The related recognition that not all breaches of equitable obligations are breaches of fiduciary obligation seems later in coming. True, such terminology is a matter of choice; but the underlying distinctions need explicit recognition. The term "fiduciary" could be used quite generally to refer to all persons subjected to equitable obligations.[14] But then separate terms would be needed to differentiate between individuals subjected to some but not all of the different equitable ("fiduciary") obligations. It seems preferable to adopt a much narrower usage. The term "fiduciary" could be confined to those individuals who are subjected to obligations of loyalty (ie obligations of self-denial). The advantage of such restricted usage is that a concise tag conveys a precise meaning. Certainly, and perhaps for this reason, such usage appears to be gaining hold.[15] Adopting this usage, a breach of confidence is not a breach of fiduciary obligation,[16] nor is a failure to act in good faith in the interests of the beneficiary and for proper purposes[17]—

[9] See the cases cited in the footnotes immediately following, and also *Clark Boyce* v. *Mouat* [1994] 1 A.C. 428, 437 *per* Lord Jauncey; *NZ Netherland Soc.* v. *Kuys* [1973] 1 W.L.R. 1126, 1130 *per* Lord Wilberforce; *Permanent BS* v. *Wheeler* (1994) 14 A.C.S.R. 109, 157 *per* Ipp J.; *Breen* v. *Williams* (1996) 70 A.L.J.R. 772, 807.

[10] See *Henderson* v. *Merrett Syndicates Ltd.* [1994] 3 W.L.R. 761, 799 *per* Lord Browne-Wilkinson; *White* v. *Jones* [1995] 2 W.L.R. 187, 209–210 *per* Lord Browne-Wilkinson; *Bristol & West BS* v. *Mothew* [1996] 4 All E.R. 698, 710, 712 *per* Millett L.J. (although referring to an equitable duty of care); *Girardet* v. *Crease & Co.* (1987) 11 B.C.L.R. (2d) 361, 362 *per* Southin J.; *LAC Minerals Ltd.* v. *International Corona Resources Ltd.* [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 647 *per* La Forest J. and 597–598 *per* Sopinka J.

[11] *Paragon Finance plc* v. *Thakerar & Co. (a firm)* [1999] 1 All E.R. 40 (CA).

[12] *Re Goldcorp Exchange Ltd.* [1994] 2 All E.R. 806, 821 *per* Lord Mustill.

[13] The cases do not seem to have gone so far yet, but see *Bishopsgate Investment Management Ltd.* v. *Maxwell (No. 2)* [1994] 1 All E.R. 261; *Target Holdings Ltd.* v. *Redferns* [1997] 1 A.C. 421, 432–439 *per* Lord Browne-Wilkinson (although counsel conceded a breach of fiduciary duty). Also see D. Hayton, "Fiduciaries in Context: An Overview" in P. Birks (ed.), *Privacy and Loyalty* (Oxford 1997) ("*Privacy*"), ch. 11, at pp. 286–290; J. Heydon (1994) 110 L.Q.R. 334.

[14] This is how the term is used in P.D. Finn, *Fiduciary Obligations* (Sydney 1977), see p. 2.

[15] See *Bristol & West BS* v. *Mothew* [1996] 4 All E.R. 698, 710, 712 *per* Millett L.J; *Breen* v. *Williams* (1996) 70 A.L.J.R. 772, 793–799 *per* Gaudron and McHugh JJ., 782 *per* Dawson and Toohey JJ., 808 *per* Gummow J.; *Warman* v. *Dwyer* (1994) 182 C.L.R. 544. Also see D. Hayton, (n. 13 above); R. P. Austin, "Moulding the Content of Fiduciary Duties" in A. J. Oakley (ed.), *Trends in Contemporary Trust Law* (Oxford 1996) ch. 7, pp. 156–159; P. D. Finn, (n. 2 above).

[16] *Indata Equipment Supplies Ltd. (trading as Autofleet)* v. *ACL Ltd.* Times, 14 August 1997.

[17] *Breen* v. *Williams* (1996) 70 A.L.J.R. 772, 793–799 *per* Gaudron and McHugh JJ.; *Sidaway* v. *Governors of Bethlem Royal Hospital* [1985] A.C. 871, 884 *per* Lord Scarman, and [1984] 1 All E.R. 1019, 1032 *per* Browne-Wilkinson L.J.

although both are breaches of equitable obligations.[18] To say that individuals occupying certain posts are often subject to all three forms of equitable obligation—fiduciary obligations, obligations of confidence and obligations of good faith and proper purposes—is no more significant than to say that the same individuals are often also subject to obligations in contract, tort and unjust enrichment.

In short, fiduciary terminology should be used carefully and restrictively, so that fiduciary law operates *only* to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence).[19]

III. Rationalising The Law/Equity Divide

A further concern to modern fiduciary law is the relevance and significance of the traditional law/equity divide. One suggestion for avoiding the difficulties in defining fiduciaries is to subsume equitable (including fiduciary) obligations under the common law umbrella of contract, tort and unjust enrichment. Common sense suggests that "the law" must respond to injustices, and that its response ought to be right the first time: there should be no place for an initial "common law" response subsequently overridden by a different "equitable" one. The history of the law's evolution—and the fact that certain developments took place in physically distinct courts—should not be allowed to overshadow the truth that the whole process, in all the courts and legislatures, has been a movement towards further refinement and sophistication of the legal *system*. It ought by now to be possible to see the law as it is, in its entirety, without the need to rehearse the saga of its development. Certain contracts are simply specifically enforceable; there should be no need to add, each time, the historical truth that initially the common law would only award damages, but that subsequently equity allowed orders for specific performance. Similarly with contracts which are subject to rescission for mistake or misrepresentation.

Even accepting this, it remains true that fiduciary law—and the law relating to other equitable obligations—demands separate treatment. It is not simply an evolutionary and sophisticated gloss on the common law of

[18] See *Hodgkinson* v. *Simms* [1994] 3 S.C.R. 377, 411–412 *per* La Forest J., pp. 464, 466 *per* Sopinka and McLachlin JJ. (diss.). In this context, a further comment on categorisation is warranted. The doctrine of undue influence (albeit an equitable doctrine discussed at length in texts on equity) is completely independent of and distinct from the various equitable *obligations*, including fiduciary obligations, being considered here. Undue influence concerns the sufficiency of consent; it enables a transaction (whether by gift or contract) to be set aside: in short, it is a doctrine relevant to the law of unjust enrichment. See D. Hayton, (n. 13 above), at p. 286. But see *CIBC Mortgages plc* v. *Pitt* [1993] 4 All E.R. 433, 439–440 *per* Lord Browne-Wilkinson, querying the difference, if any, between fiduciary obligation and presumed undue influence. Also see P. D. Finn, (n. 14 above), at ch. 16, and L. S. Sealy [1962] C.L.J. 69, 79, where undue influence is discussed in the context of fiduciary obligations.

[19] P.D. Finn, (n. 2 above), at p. 28.

contract, tort or unjust enrichment.[20] Fiduciary obligations cannot be classed as a sub-category of contract: they do not arise by process of offer and acceptance supported by consideration; the remedies for their breach are not aimed at placing the victim, so far as money can do it, in some pre-agreed anticipated position. Nor are these obligations a sub-category of tort. Like tort (and unjust enrichment), they are obligations imposed by operation of law rather than by agreement, but there the similarities end. The policy imperatives which underpin fiduciary obligations are quite different from those underpinning tort, and neither mirror those underpinning unjust enrichment. These differences have ensured that the remedial consequences for all three remain appropriately distinct. It follows that the three should necessarily be seen as different and distinct subdivisions of the law.

If these differences are conceded, then it might be possible to eliminate the distracting "equitable" tag by siting all the conventional "equitable" obligations under the umbrella term of "obligations of good faith and loyalty". The class would include fiduciary obligations, obligations of confidence, and duties to act bona fide and for proper purposes. This distinct class would permit formal recognition of the significant divisions between contract, tort, unjust enrichment and "obligations of good faith and loyalty", but would consign to legal history the chronology and place of the various developments. A side-benefit of this different labelling might be to deny the option for surreptitious or selective law reform—of either remedies or obligations themselves—by the simple device of attaching an "equitable" tag to a defendant.

IV. Rationalising The Incidence of Fiduciary Obligations

Even if it is conceded that fiduciary obligations are obligations of loyalty imposed by law rather than by agreement[21] and contained within a wider category of obligations of good faith and loyalty, the central issue remains: when will such obligations be imposed? The issue has inspired numerous academic writers, many reciting theories too well-known to need rehearsing here. Also too well-known is the disappointing fact that none so far has satisfactorily defined the circumstances which give rise to the obligation.

Commentators have tended to focus on relationship descriptors, assuming that when similarly styled relationships arise one party will be bound by fiduciary obligations.[22] Mason J. in *Hospital Products* v. *United States*

[20] See J. Geltzer, (n. 6 above), at pp. 166–167 and the references cited.

[21] P.D. Finn, (n. 2 above), at p. 54. "Imposing" these obligations remains controversial: see L. Smith (1995) 74 Can. Bar Rev. 714, 717: a person "cannot become a fiduciary unless he or she wills it"; also see L. Hoyano, "The Flight to the Fiduciary Haven" in *Privacy* (n. 13 above), ch. 8 at pp. 182–183, asserting that fiduciary relationships outside the traditional categories require an express or implied undertaking to act solely in the interests of another, an undertaking which parallels the assumption of responsibility doctrine in tort.

[22] The most popular theories are examined in J. C. Shepherd (1981) 97 L.Q.R. 51.

Surgical Corporation[23] isolated what are frequently seen as the central ideas underpinning fiduciary relationships:

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or a practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibilities.[24]

This quotation earmarks the characteristics commonly asserted to be critical in determining the incidence of fiduciary obligations: one party entrusts property to another; or undertakes to act in the interests of another; or relies on another; or is vulnerable to abuse by another;[25] or is able to exercise a discretion affecting the other.[26] But the difficulty has always been that these descriptors, although apt to describe relationships where fiduciary obligations *are* imposed, are often equally apt when such obligations are absent.[27] It follows that they cannot adequately and restrictively *define* the incidence of fiduciary obligations.

Fewer commentators have focused on the social purpose of the fiduciary obligation itself. This must surely be the starting point for any analysis of the incidence of the obligation: legal "rules" must be linked to the particular social purpose for which they were devised,[28] albeit the link may only be apparent with hindsight. Fiduciary law originated in public policy.[29] To that extent it has parallels with negligence and, as with negligence, it can be expected to adapt to reflect changing social standards. This is already

[23] (1984) 156 C.L.R. 41.

[24] *Ibid*., at pp. 96–97. Also see Lord Browne-Wilkinson in *White* v. *Jones* [1995] 2 A.C. 206, 271: "The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B".

[25] This idea is especially relied on in Canadian cases: see, e.g., *LAC Minerals* v. *International Corona Resources* (1989) 61 D.L.R. (4th) 14, 63 *per* Sopinka J.; *Guerin* v. *R.* (1984) 13 D.L.R. (4th) 321; *Frame* v. *Smith* (1987) 42 D.L.R. (4th) 81, 98–99 *per* Wilson J., dissenting. This focus on vulnerability has been criticised as evidencing a departure from the core fiduciary notion of the defendant's selflessness: see L.S. Sealy (1995) 9 J.C.L. 37, 40.

[26] See E. Weinrib (1975) U. Toronto L.J. 1, 7; *Guerin* v. *R.* (1984) 13 D.L.R. (4th) 321, 341 *per* Dickson J.

[27] For example, the characteristics are equally apt to describe the relationship between home-owner and house-painter, diner and chef, driver and other road-users, all relationships accepted as adequately protected by contract and tort law. Also see *Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74, 98 *per* Lord Mustill.

[28] J. Hackney, "More than a trace of the old philosophy" in *Classification* (n. 6 above), ch. 6 at p. 126.

[29] P. Finn, (n. 2 above), at p. 27. Also see *Welles* v. *Middleton* (1784) 1 Cox 112, 124–125, where fiduciary status was justified as necessary "for the preservation of mankind."

evident in the incursions of fiduciary law into commerce,[30] incursions justified by economic analysis.[31]

What is suggested here is that fiduciary obligations should be imposed not simply when certain descriptors are apt, but when the very *function* or *purpose* or *reason* for one party's role in the relationship *demands* that the party operate on the basis of self-denial. This condition is not met simply because one party would prefer the other to act selflessly, or has assumed this to be the case; nor is the condition denied simply because it is conceivable that the subject's interests can be served notwithstanding selfish behaviour.[32] All of our law is directed at protecting the interests of parties to a relationship (consensual or otherwise). Imposition of an obligation of self-denial affords ultimate protection, but it operates as a sledge-hammer: it ought to be used only when absolutely necessary. Arguably it is needed only if, without it, the subject would be left with no effective legal means of monitoring the relationship; if, without it, obligations imposed in contract or tort, or by a duty to act for proper purposes, would be insufficient for the task. As a defining characteristic, this purpose-based requirement appears very elastic. However, it ought to prove no more difficult to apply than the search for implied terms in contract, or a duty of care in negligence.

This restrictive test for the imposition of fiduciary obligations is met by what are currently styled the "status-based" fiduciary relationships—trustee and beneficiary, director and company, partners, and certain agents and their principals. It may be that outside these nominated categories there is never, or rarely ever, a justification for imposing fiduciary obligations. Certainly great care needs to be exercised in discriminating between these relationships—which clearly demand the protection of fiduciary law—and relationships where the protection afforded by tort and contract (including recourse to equitable doctrines of misrepresentation, undue influence and unconscionable bargains) fully meets the needs and purposes of the parties' engagement.[33]

Finally, none of this necessarily defines or limits the interests which might be protected by a fiduciary obligation demanding loyalty or self-denial. Clearly a subject's economic interests fall most naturally to be protected: the central purpose of many relationships where fiduciary obligations are deemed appropriate is the protection or advancement of these interests. It requires separate argument, however, to assert that fiduciary obligations should be *limited* to protecting economic interests.

[30] J. Glover, *Commercial Equity—Fiduciary Relationships* (Sydney 1995), at pp. 17–18.
[31] G.K. Hadfield (1997) 28 Can. Bus. L.J. 141.
[32] As in *Boardman* v. *Phipps* [1967] 2 A.C. 46.
[33] Courts already concede that the finding of a fiduciary relationship between the parties must create "obligations of a different character from those deriving from the contract itself" (*Re Goldcorp Exchange Ltd.* [1995] 1 A.C. 74, 98). Also see L.S. Sealy (1995) 8 J.C.L. 142 and (1995) 9 J.C.L. 37, nn. 56, 57.

Nevertheless, this does seem to be the better view. Bodily integrity, privacy, freedom of information, family and community values, and such like appear to be inappropriate subjects for protection via an obligation of *loyalty*.[34] If the law is inadequate in these different areas, then there should of course be pressure for reform. However, fiduciary obligations ought not to be used as a back-door route to law reform of private law obligations and public law protections: this perpetrates in all its worst guises the common law/equity divide discussed earlier.

V. Remedial Constraints

As noted earlier, part of the drive for a loose application of fiduciary principles is the attraction of preferential remedies. But the reverse is also a problem. Given an established fiduciary relationship, there is a growing tendency to assert, or assume, that the remedial consequences are not limited to disgorgement of profits (either via personal accounting or a constructive trust, or by rescission of the impugned transaction), but include damages or equitable compensation.[35] When there has been a breach of loyalty, the appropriate remedy, for very good reasons, is disgorgement.[36] For reasons noted earlier, recourse to a wide common law "remedial menu" is not advocated; it would fundamentally alter the rights being protected. If damages are desired, then a claim needs to be based on proof that other obligations, directed at preservation from harm, have been breached.[37] Often this will not be difficult, but the technical exercise will assist in preserving the structure and content of the rights in issue—or at least in ensuring that any alteration is intentional.

VI. Conclusions

The conclusions can be shortly stated. Fiduciary obligations are imposed by private law, but their function is public and their purpose social.[38] Accepting this, then although all human interaction cannot sensibly be based on putting others' interests first, some must. When self-denial is *necessary* to achieve the purpose of a relationship, then, and only then, should fiduciary obligations be imposed. In assessing this the focus is squarely

[34] This appears to be accepted by English and Australian courts: see L. Hoyano, (n 21 above), at p. 173 and the references cited; D. Hayton, (n. 13 above), at pp. 291–292. But for the contrary approach, see, *e.g., Norberg* v. *Wynrib* [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 229, 268–269 and 275 *per* McLachlin J.; *Frame* v. *Smith* [1987] 2 S.C.R. 99, 143, 42 D.L.R. (4th) 81 *per* Wilson J.; *M (K)* v. *M (H)* (1992) 96 D.L.R. (4th) 289.

[35] See J. D. McCamus (1997) 28 Can. Bus. L.J. 107, 112–113, 129–130.

[36] See S. Worthington, "Reconsidering Disgorgement for Wrongs" (1999) 62 M.L.R. 218; and "Remedying and Ratifying Directors' Breaches" (2000) 116 L.Q.R. (forthcoming).

[37] See J. Stapleton, (n. 8 above).

[38] See L. Wedderburn (1985) 23 Osgoode Hall L.J. 203, 221.

on the role undertaken by the fiduciary, not on the individual personal characteristics of either party. More often than not imposition of an obligation of self-denial is unwarranted: the parties' interests are adequately protected by obligations imposed in contract, tort, unjust enrichment and so forth. All these bodies of law have been attenuated to meet the perceived and growing needs of parties, and no doubt this development will continue. In those rare situations where an obligation of loyalty and self-denial *is* necessary, its social significance is acknowledged by applying the punitive and prophylactic remedy of disgorgement in cases of breach. In short, the suggestion is that fiduciary law should not be the growing area that it is sometimes alleged to be.[39]

[39] See, *e.g.*, T. Frankel, (n. 2 above), at p. 798, asserting that "society is evolving into one based predominantly on fiduciary relations."