FIDUCIARY LAW AND NON-ECONOMIC INTERESTS

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Australian courts have recently rejected claims in fiduciary law relating to the mistreatment of children on the basis that the claims related to 'non-economic' interests. This article critically examines the approach of recent Australian decisions. Part I of the article illustrates the implications of the way courts conceive 'fiduciary relationships.' The author sets out three main approaches to classifying fiduciary relationships: the 'established categories' approach, the 'diagnostic' approach and the 'functional' approach. It is argued that the latter approach best allows courts, when faced with novel claims involving non-economic interests, to adopt a flexible approach that accords with the nature and purpose of the equitable principles underlying fiduciary law. Part II briefly compares the approach of Canadian and Australian courts to the question of whether non-economic interests can fall within the 'scope' of fiduciary obligations. In Part III the author identifies three propositions which underlie the Australian approach in the post-Breen v Williams era: firstly, that the High Court in Breen v Williams rejected the possibility that fiduciary law could cover non-economic interests; secondly, that the Canadian approach to fiduciary law in respect of non-economic interests imposes positive or prescriptive obligations; and thirdly, that fiduciary law adds nothing to existing doctrines of contract and tort law in relation to non-economic interests. The author argues that these propositions do not provide the support required to justify the Australian approach. It is argued that the use of the distinction between economic and non-economic interests rests upon a misapplication of Breen v Williams and a simplistic characterisation of the Canadian approach and fails to address the fundamental nature and purpose of fiduciary law. In particular, the author argues that the question of whether fiduciary law can cover non-economic interests should be separated from the debate on the proscriptive/prescriptive models of fiduciary law.

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INTRODUCTION

Australian courts recently have been asked to consider the applicability of fiduciary law in relation to the mistreatment of children by those responsible for their care. In Canada, such claims have been successful.[1] In Australia, however, courts have excluded the application of fiduciary law in this area on the basis that the interests sought to be protected are 'non-economic'. The cases have concerned physical and sexual abuse of children allegedly suffered at the hands of guardians,[2] and claims arising out of the policy of forced removal of indigenous children from their families.[3] The latter cases have involved allegations not just of physical and sexual abuse, but also deprivation and attempted destruction of family, culture and race. In these instances, findings of fact have played such a considerable part in the plaintiffs' failures that the findings of law may be open to challenge.[4] However, while there is conflicting authority on the question of whether such allegations disclose a cause of action in Australia,[5] it is clear that so long as the distinction between economic and non-economic interests continues to inform the operation of Australian fiduciary law, the likelihood of success for plaintiffs is low.[6]

The fiduciary concept is attractive to the plaintiffs in these cases for two main reasons. On one level, feelings of exploitation feed naturally into fiduciary law's rhetoric of betrayal. More practically, claims for breach of fiduciary duty have

1 See, eg, *M(K) v M(H)* (1992) 96 DLR (4th) 289; *J(LA) v J(H)* (1992) 102 DLR (4th) 177; *B(WR) v Plint* (1998) 161 DLR (4th) 538; additional reasons [2001] BCSC 997. See Elaine Lee, 'Fiduciary Duty and Family Obligations: The Supreme Court of Canada Signals Change' (1993) 57 *Saskatchewan Law Review* 457.

2 *Paramasivam v Flynn* (1998) 90 FCR 489 ('*Paramasivam*').

3 *Williams v Minister Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86 ('*Williams*'); *Cubillo v Commonwealth* (2000) 174 ALR 97 ('*Cubillo*'). Judgments have been entered in the appeals to these cases. However, the trial judgments remain the best site of analysis in relation to the fiduciary question. In *Williams*, the fiduciary question was not pursued in the appeal: *Williams v Minister Aboriginal Land Rights Act 1983* (2000) Aust Torts Reports ¶81-578, 64,147. In *Cubillo*, the scope of the fiduciary claim was narrowed on appeal, and in any event, the Full Court of the Federal Court upheld the trial judge's findings in relation to the fiduciary question: *Cubillo v Commonwealth* [2001] FCA 1213, [447]-[469].

4 *Johnson v Department of Community Services* (2000) Aust Torts Reports ¶81-540.

5 Cases finding that such allegations disclose a cause of action include *Johnson v Department of Community Services* (2000) Aust Torts Reports ¶81-540; *'SD' v Director General of Community Welfare Services* (Vic) [2001] NSWSC 441; *Cubillo v Commonwealth* (1999) 89 FCR 528 ('*Cubillo (No 1)*'); *Williams v Minister Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 ('*Williams (No 1)*'). Contra *Paramasivam* (1998) 90 FCR 489; *Woodhead v Elbourne* [2000] QSC 42; *Smith v Roman Catholic Archbishop of Perth* [2001] WASC 86.

6 In *Cubillo (No 1)* (1999) 89 FCR 528, 568-76, O'Loughlin J reached the same position as Rolfe J in *Johnson v Department of Community Services* (2000) Aust Torts Reports ¶81-540, only to find at trial that the interests claimed were outside the scope of fiduciary obligations: *Cubillo* (2000) 174 ALR 97, 497-509.

possible remedial advantages,[7] and often avoid limitation statutes.[8] However, while remedial and procedural advantages are of significance, the fiduciary concept should not expand purely on the basis of practical advantage. Limitation provisions can be reformed to enable flexibility in relation to certain kinds of torts, such as battery committed on children,[9] or alternatively, to include claims for breach of fiduciary duty.[10] Thus, any development must be justified in principle.

Comparing the approach in Australia and Canada, this article will examine whether fiduciary law has a role to play in protecting non-economic interests that accords with the principles on which it is based. The comparison serves more than a descriptive purpose. Particularly since the High Court case of *Breen v Williams*,[11] Australian courts have defined their approach largely in opposition to the developments in Canada. Part I will consider how the courts' approach to the question of relationships impacts upon the types of interests that may be protected by fiduciary law. Part II will set out the differences between the way Canadian and Australian courts address the question of the scope of fiduciary obligations. Part III will analyse the bases upon which Australian courts have justified the exclusion of non-economic interests from the realm of fiduciary law. Finally, Part IV will consider the question of remedies.

Before analysing the courts' approach to non-economic interests, it is necessary to consider what the term means. It seems that when the courts refer to non-economic interests, they are referring to interests in physical and emotional health, as opposed to financial or proprietary interests. However, in taking this

7 See J Gatreau, 'Demystifying the Fiduciary Mystique' (1989) 68 *Canadian Bar Review* 1, 20-29; *Cubillo* (2000) 174 ALR 97, 545.

8 For example, s 5(8) of the *Limitation of Actions Act 1958* (Vic) provides that the statutory limitation periods do not apply to claims in equity, except in so far as they apply by analogy. The position is similar in NSW under s 23 of the *Limitation Act 1969* (NSW), see *Williams (No 1)* (1994) 35 NSWLR 497, 509, where Kirby P held that the Act did not apply by analogy to the fiduciary claims; contra *B(TL) v C(RE)* [2000] MBCA 83, [113] (Huband J, dissenting). See generally RP Meagher, WMC Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (1992), 784-5.

9 For example, in British Columbia, s 3(4)(k) and (l) of the *Limitation Act* RSBC 1996 specifically exclude from limitation causes of action for sexual assault or other 'misconduct of a sexual nature ... where the misconduct occurred while the person was a minor.' See *B(KL) v British Columbia* (2001) 5 WWR 47, 64. While no similar provision exists in Victoria, it is arguable that claims for child sexual abuse fall within the 'delayed discoverability' provision delaying the accrual of a cause of action to the date where the plaintiff first knows that they have suffered injuries for which another is responsible: *Limitation of Actions Act 1958* (Vic) s 5(1A): see *Mason v Mason* [1997] 1 VR 301; contra *Stubbings v Webb* [1993] AC 498 where a similar provision was held not to apply to intentional torts. Alternately, the limitation period may be extended if the court thinks it just and reasonable to do so: see, eg, *Limitation of Actions Act 1958* (Vic) s 23A. Another option for victims of child sexual abuse is the concept of fraudulent concealment: see, eg, *Limitation of Actions Act 1958* (Vic) s 27(b). For a discussion of the challenges faced by victims of child sexual abuse in accessing the courts, including limitation issues, see Annette Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221.

10 For example, in the ACT, claims for breach of fiduciary duty have been held to fall within the wide concepts of 'action' and 'cause of action' in s 8(1) of the *Limitation Act 1985* (ACT) and thus within the general limitation period of six years set out in s 11: *Paramasivam* (1998) 90 FCR 489, 501. In British Columbia and Manitoba, a six year limitation period applies to claims for breach of fiduciary duty: *Limitation Act* RSBC 1996, s 3(5), *Limitation of Actions Act* RSM 1987, s 2(1)(k).

11 (1996) 186 CLR 71.

approach, the courts have apparently been unaware of the difficulty of such classification. Physical and emotional injuries often cause harm that would be regarded as 'economic' in tort law, such as lost earning capacity and medical expenses.[12] Further, in *Cubillo*, one aspect of the fiduciary claim involved the exploitative provision of labour.[13] Nevertheless, in order to examine the way courts approach fiduciary law in respect of non-economic interests, this article will assume that interests affected by personal injuries are capable of this classification.

I NON-ECONOMIC INTERESTS AND 'FIDUCIARY RELATIONSHIPS'

In seeking to exclude the application of fiduciary law in relation to non-economic interests, one approach open to the courts is to place the relationships in which non-economic interests are at stake outside the range of relationships in which fiduciary obligations exist. Another approach is to take a broad view of the relationships that may give rise to fiduciary obligations, but to define the scope of fiduciary obligations so as to exclude non-economic interests. The latter has been the approach of Australian courts.[14] In fact, this is the other side of the same coin, as the courts are effectively preventing the application of fiduciary law in those relationships by omitting to impose fiduciary duties over the most crucial interests at stake.[15] This Part will examine the possible approaches the courts can take to the issue of fiduciary relationships when faced with novel fiduciary claims. The purpose of this discussion is not to prescribe a list of relationships that courts ought to regard as fiduciary, but to examine how the courts approach to the question of relationship classification impacts upon the types of interests that may be protected by fiduciary law.

A *The 'Established Categories' Approach*

The starting point has often been to see whether the relationship in question falls within the so-called 'established' or 'per se' categories of fiduciary relationships. This approach has a number of limitations. Firstly, there is no consensus on what constitutes the 'established categories'. In some Australian judgments the relationships of priest-penitent, guardian-ward and parent-child are seen to fall within this core.[16] In others, the list is more limited.[17] Similar

12 See Nathalie Des Rosiers, 'Childhood Sexual Abuse and the Civil Courts' (1999) 7 *Tort Law Review* 201, 202. In tort, non-economic loss in personal injury cases refers to 'pain and suffering, loss of amenities (or loss of enjoyment of life) and loss of expectation of life': Michael Tilbury, 'Non-Economic Loss and Personal Injury Damages: A Comment on the Law Commission's Consultation Paper' (1997) 5 *Tort Law Review* 62, 70.

13 (2000) 174 ALR 97, 506. At 508, O'Loughlin J stated that the evidence on this point was 'insufficient to justify any finding.'

14 *Paramasivam* (1998) 90 FCR 489, 504-8; *Williams* (1999) 25 Fam LR 86, 231-43; *Cubillo* (2000) 174 ALR 97, 497-509.

15 See Des Rosiers, 'Childhood Sexual Abuse', above n 12, 202.

16 See, eg, *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 555.

17 See, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J) ('*Hospital Products*').

differences can be found in academic writing.[18] Generally, the lists are proffered as examples and have minimal relevance to the case at hand, and yet later courts use these incomplete lists as if they hold determining value.[19]

The inconsistency results partly from a confusion of the categories of fiduciary relationships and undue influence.[20] In *Johnson v Buttress*, Dixon J included solicitor-client, doctor-patient, parent-child, guardian-ward and fiancé-fianceéwithin a list of relationships in which undue influence will be presumed and 'fiduciary characteristics can be seen.'[21] The confusion has endured, and owes much to the fact that whilst the doctrines are distinct,[22] the policies underlying them overlap.[23] In broad terms, both seek to prevent opportunistic conduct in circumstances of vulnerability.[24] It is argued that the categories of undue influence provide a useful starting point for examining the types of non-commercial relationships in which fiduciary obligations might be owed. However, courts need to be aware of the origins of the categories. Any expansion of fiduciary obligations in relationships previously regarded as merely raising a presumption of undue influence must be based on an analysis of the nature and function of the relationship.

Indeed, this raises the second key problem with using the 'established categories' approach when novel claims are made. When basing fiduciary characteristics of the relationship on a label, courts fail to analyse for what purpose the fiduciary obligations exist. Without such analysis, it is difficult for the courts to frame a coherent argument as to why some interests, and not others, can be protected by fiduciary law. This problem has largely been avoided in Canada. While the relationships of parent-child and doctor-patient have been classed as established heads of fiduciary obligations,[25] such classification has also been accompanied by an analysis of the nature and function of the relationships.[26]

18 For an expansive list, see Robert Flannigan 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, 293-4. For a more restricted list, see Ernest Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 5.

19 For example, in *Williams* (1999) 25 Fam LR 86, 236, Abadee J made much of the fact that Gibbs CJ and Mason J did not include guardian-ward within their lists in *Hospital Products*, but neglected to acknowledge that Dawson J did so: *Hospital Products* (1984) 156 CLR 41, 141. In *Williams (No 1)* (1994) 35 NSWLR 497, 511, Kirby J cited Dawson J's judgment in *Hospital Products* to find that guardian-ward is within the established categories.

20 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538 may be an example of this. See also *Cubillo* (2000) 174 ALR 97, 505.

21 (1936) 56 CLR 113, 134-5.

22 John Glover, *Commercial Equity: Fiduciary Relationships* (1995), 10.

23 Tony Duggan, 'Undue Influence' in Patrick Parkinson (ed), *The Principles of Equity* (1996) 417.

24 Robert Flannigan, 'Fiduciary Regulation of Sexual Exploitation' (2000) 79 *Canadian Bar Review* 301, 303-4.

25 McLachlin J referred in obiter to the parent-child relationship as an 'perhaps the archetypal status relationship' when comparing its features to the characteristics of fiduciary relationship in *Norberg v Wynrib* (1992) DLR (4th) 449, 487. In addition to the application of Wilson J's characteristics from *Frame v Smith* (1987) 42 DLR (4th) 81 (see below n 32 and accompanying text), La Forest J also argues that the parent-child relationship is a *per se* head of fiduciary obligations in *M(K) v M(H)* (1992) 96 DLR (4th) 289, 325-6. In *McInerney v MacDonald* (1992) 93 DLR (4th) 415, 423-4, the court did not cite *Frame v Smith*, but cited older authority suggesting that the doctor-patient relationship is an established category.

26 See below nn 47-50 and accompanying text.

B *The 'Diagnostic' Approach*

Outside the established categories, courts have looked to analogies with the established categories and have developed a series of descriptions in an effort to distil a diagnostic test. The approach has drawn strongly on academic writing[27] and has resulted in guides used in novel cases in Australia and Canada. The most prominent Australian guide is that of Mason J in *Hospital Products*.[28] According to Mason J, the

> critical feature of [fiduciary] 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 other person in a legal or 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.[29]

The comparable Canadian description is contained in the judgment of Wilson J in *Frame v Smith*.[30] This case also provides the basis upon which Canadian courts have applied fiduciary law in respect of non-economic interests. In that case, a wife had custody of children following a separation from her husband, and denied him access to them. The husband's action for damages was dismissed by the Supreme Court of Canada as not disclosing a cause of action. In dissent, Wilson J held that the wife's denial of access was a breach of fiduciary duty. Identifying three general characteristics of cases where fiduciary obligations had been imposed, her Honour proposed a 'rough and ready guide'[31] to the recognition of fiduciary relationships. According to Wilson J, fiduciary obligations arise if:

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.[32]

Such descriptions are undoubtedly helpful in providing a language which evokes many of the key concepts of fiduciary law. However, there are two main difficulties with reliance on these descriptions. Firstly, the search for a single unifying test is fruitless.[33] While the tests may suit a diagnostic purpose in a single

27 Such as J C Shepherd, 'Towards a Unified Concept of Fiduciary Relations' (1981) 97 *Law Quarterly Review* 51; Weinrib, above n 18.

28 See also the alternative 'test' of 'mutual trust and confidence' in the context of a joint venture: *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

29 *Hospital Products* (1984) 156 CLR 41, 96-7.

30 (1987) 42 DLR (4th) 81, 84-111.

31 Ibid 98-9.

32 Ibid 99.

33 See *Hospital Products* (1984) 156 CLR 41, 69 (Gibbs CJ); Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterley Review* 238, 246; Paul Finn, 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciary and Trusts* (1989), 26.

case, no single test can encapsulate all the different types of relationships and circumstances in which fiduciary obligations have been recognised. At best, what is seen is a collection of overlapping concepts, varying in relevance depending on the nature of the relationship and its context.[34] Secondly, the requisite flexibility of any general description weakens its capacity to act as a diagnostic tool in novel cases. A comparison between the application of the tests in *Frame v Smith* and *Hospital Products* to relationships involving non-economic interests bears this out.

1 *The Application of Frame v Smith in Canada*

While Canadian judges go through the process of examining the established categories and the various bases and theories of the fiduciary concept, the description in *Frame v Smith* and its essential components of power, discretion and vulnerability occupies a central role in Canadian fiduciary analysis.[35] Canadian courts have found the language of power, discretion and vulnerability easy to apply in the context of the relationship between doctor and patient, and within family relations; two areas where non-economic interests are at stake.

In *Norberg v Wynrib*, McLachlin J held that doctors have power over the treatment of patients, whose relative lack of expertise leaves the doctor with unfettered discretion in relation to advice and treatment.[36] Further, as McLachlin J illustrates, in few situations do people feel as vulnerable, in a real and personal sense, than when they seek medical aid. The illness itself creates a sense of vulnerability, and essential to the treatment is a physical and intellectual submission by the patient to the expertise of the doctor.[37] In examination, the doctor may request the patient undress, or reveal personal information about themselves.[38] To maintain the confidentiality essential for such exposure, the consultations are private, leaving the doctor with little risk of outside interference or supervision.[39]

Similarly, in *M(K) v M(H)*, La Forest J was able to invoke the language of power, discretion and vulnerability to describe the relationship between parent and child. In that case, a father sexually abused his child. In relation to Wilson J's description, La Forest J stated that:

> Even a cursory examination of these *indicia* establishes that a parent must owe fiduciary obligations to his or her child. Parents exercise great power over their children's lives, and make daily decisions that affect their welfare. In this

34 See John Glover, 'The Identification of Fiduciaries', in Peter Birks (ed), *Privacy and Loyalty* (1997), 269-278.

35 See, eg, *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

36 *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 489. Contra Paul Michalik, 'Doctors' Fiduciary Duties' (1998) 6 *Journal of Law and Medicine* 168, 175-6, who argues that the fact that the patient must consent to each aspect of treatment means that the doctor does not have unfettered discretion.

37 See *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 492. See also John Ellard, 'Sex and the Professions' (2001) 75 *Australian Law Journal* 248, 252. It has been argued that the framing of law according to vulnerability obscures the need to address the systemic, and often gendered, causes of that vulnerability: Jan Cowie, 'Difference, Dominance, Dilemma: A Critical Analysis of *Norberg v Wynrib*' (1994) 58 *Saskatchewan Law Review* 357, 372.

38 *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 491.

39 Ibid 491-2.

regard, the child is without doubt at the mercy of her parents.[40]

This approach clearly has intuitive appeal. Particularly in the early years, parents have almost unfettered control over all aspects of the child's life. The child is clearly vulnerable to abuse of this control.

2 *The Application of Hospital Products in Australia*

Given the similarities in the language used by Mason J and Wilson J, one might expect the tests to have similar application. Aside from the requirement of 'undertaking', the descriptions share the common language of power, discretion and vulnerability. Further, in both cases the fiduciary duty relates to the 'legal and practical' interests of the beneficiary. Thus, Australian fiduciary law contains many of the same ingredients Canadian courts have used to characterise the relationships of parent-child and doctor-patient as fiduciary.[41] Indeed, in *Department of Health and Community Services v JWB*,[42] McHugh J cited Mason J's description in placing the parent-child relationship within the ambit of fiduciary law. However in *Paramasivam*, a very different approach was taken.

In that case, the Court recognised that sexual abuse of a child by a guardian could be considered an abuse of a position of trust and confidence, or a breach of an undertaking to act in a representative capacity, and that it could be argued the guardian allowed his 'personal interest (in the form of self gratification) to displace a duty to protect the [child's] interests.'[43] However, the Court went on to say that 'it should not be concluded, simply because the allegations can be described in those terms, that the appellant should succeed in an action for breach of fiduciary duty if the allegations are made good.'[44] The court regarded the 'apparent applicability' of the terms as evidence of the imperfection of the formulae used to describe fiduciary obligations and argued that the context in which fiduciary obligations had previously been imposed was very different from the case at hand.[45] Faced with the vagueness of the language of fiduciary indicia, the court fell back on familiar types of relationships, and the types of interests previously protected. This approach inevitably impedes development in novel cases. Despite the imperfection of fiduciary formulae, it is submitted that courts cannot overlook the 'apparent applicability' of the terms. It may be that the applicability of the terms represents underlying features of the relationship and the conduct that should attract fiduciary law. But where should the courts look to bridge this gap between apparent and justified applicability of fiduciary indicia? The answer may come from a closer analysis of the nature and function of the fiduciary concept and the relationships and conduct in question.

40 *M(K) v M(H)* (1992) 96 DLR (4th) 289, 325 (emphasis in original). La Forest J also held that the decision to have children operated as a unilateral undertaking of a fiduciary nature: at 324. Rutherford J agreed that the fiduciary nature of the parent-child relationship was self-evident in *J(LA) v J(H)* (1992) 102 DLR (4th) 177, 183.

41 For an example of how various fiduciary theories can be applied to the doctor-patient relationship, see Michalik, above n 36, 170-77.

42 (1992) 175 CLR 218, 317.

43 *Paramasivam* (1998) 90 FCR 489, 505.

44 Ibid.

45 Ibid.

C *The 'Functional' Approach*[46]

In the cases where Canadian judges have extended fiduciary law, the social function of the fiduciary obligation occupies an important platform of the analysis. In *Frame v Smith*, Wilson J commented on the unique ability of fiduciary law to ensure, in a way that best protects the interests of the child, that parents given custody of children by order of the court do not abuse this power.[47] As the corollary to the vulnerability to which patients expose themselves for the purpose of treatment, McLachlin J in *Norberg v Wynrib* stated that '[s]ociety has an abiding interest in ensuring that the power entrusted to physicians ... both collectively and individually, not be used in corrupt ways...'[48] Similarly, the Court in *McInerney v MacDonald* suggested that the increasing mobility of patients in modern society and the complexity of modern medical treatment lent weight to the contention that medical records be available to patients.[49] Although the social desirability of preventing child sex abuse needs no defending, La Forest J in *M(K) v M(H)* noted that the duty of loyalty embodied in fiduciary law arises from the 'inherent purpose of the family relationship'.[50]

There is an increasing, though not universal, willingness in academic and judicial circles to engage in such analysis as the basis for assessing novel fiduciary claims.[51] Much of this analysis springs from Paul Finn's influential paper published in 1989.[52] Finn states that the fiduciary principle originates in, and is an instrument of, public policy.[53] Through its enforcement of a strict standard of loyalty, it is used, he argues, to 'maintain the integrity, credibility and utility of relationships perceived to be of importance in a society.'[54] Having identified this underlying purpose, the operation of fiduciary law proceeds on community (and, in a way, individual[55]) expectations that in certain relationships and circumstances, one party will act in the interests of another.[56]

This approach has some support in Australia. Mason CJ stated in a speech published almost a decade after *Hospital Products* that fiduciary obligations are imposed where

46 This term is used by Leonard Rotman, 'Fiduciary Doctrine: A Concept in Need of Understanding' (1996) 34 *Alberta Law Review* 821. Rather than a new concept, however, the term reflects a wider trend.

47 (1987) 42 DLR (4th) 81, 104-6.

48 (1992) 92 DLR (4th) 449, 490.

49 (1992) 93 DLR (4th) 415, 421.

50 (1992) 96 DLR (4th) 289, 326.

51 See Finn, 'The Fiduciary Principle', above n 33; Mason above n 33, 246; Flannigan, 'Fiduciary Regulation of Sexual Exploitation', above n 24; Rotman, above n 46; *Pilmer v Duke Group Ltd (In Liq)* (2001) 75 ALJR 1067, 1095 ('*Pilmer*').

52 Finn, 'The Fiduciary Principle', above n 33. Cf Paul Finn, *Fiduciary Obligations* (1977) in which the author argued that the classification of relationships as 'fiduciary' was meaningless, and that fiduciary law could only be interpreted according to the obligations it imposes: at 1-3.

53 Finn, 'The Fiduciary Principle', above n 33, 26-7.

54 Ibid 26.

55 See *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 476 (Davies, Gummow and Sheppard JJ).

56 Finn, 'The Fiduciary Principle', above n 33, 46.

> courts, reflecting ... 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 interests of the first party or at least in the joint interests of the parties and not solely self-interestedly.[57]

Most recently, Kirby J in *Pilmer* regarded this approach, though susceptible to being 'criticised as tautologous and subjective', as nevertheless representing 'the best attempt to express what is involved.'[58] Glover suggests that the potential for undesirable liabilities arising from the application of such a broad standard would inevitably lead to arbitrary limitations.[59] However, as can be seen from the distinction between economic and non-economic interests, arbitrary limitations already exist. An advantage of this approach is that acknowledging an underlying purpose for the imposition of fiduciary obligations promotes the flexible development of fiduciary law within a coherent framework.[60] Significantly, this approach does not advocate the abandonment of the fiduciary indicia expressed in *Hospital Products* and elsewhere. Indeed, the indicia can be used to inform the basis of the fiduciary expectation. The reason one might expect a party to act in the interests of another will include such considerations as power, discretion, vulnerability, undertaking, confidence and reliance.[61]

Another key benefit of this approach is that in asking which relationships require the imposition of duties of loyalty in order to maintain their 'integrity, credibility and utility,' courts are forced to consider the interests which are required to be protected. Using the guardian-ward relationship as an example, it can be seen that an attempt to consider the purpose for which fiduciary law operates promotes a more coherent approach to the interests that may be protected. In Australia, it appears uncontentious that fiduciary law requires any power of a guardian over the ward's legal or economic interests be exercised in the interests of the ward.[62] At a fundamental level, this standard exists to preserve the integrity, credibility and utility of the guardian-ward relationship. But in their role as custodian of the ward, the guardian's powers extend beyond legal or economic interests.[63] The abuse of custodial power through sexual assault, for example, clearly undermines integrity, credibility and utility of the relationship. Thus, if fiduciary law operates to proscribe such abuses of position, a ward's interest in bodily integrity should be capable of its protection. At least in regards of the use of custodial power to perpetrate sexual abuse, the same may be said of the parent-child relationship. The allocation of duties within that relationship is more complicated than for guardian-ward, which, particularly in an institutional setting, can be said to exist

57 Mason, above n 33, 246.
58 *Pilmer* (2001) 75 ALJR 1067, 1095.
59 Glover, *Fiduciary Relationships*, above n 22, 27.
60 Rotman, above n 46, 832.
61 Finn, 'The Fiduciary Principle', above n 33, 46; Rotman, above n 46, 837-51.
62 *Clay v Clay* (2001) 178 ALR 193, 206; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 412, 426-7; *Paramasivam* (1998) 90 FCR 489, 504; *Williams* (1999) 25 Fam LR 86, 237-9; *Cubillo* (2000) 174 ALR 97, 502-5.
63 See J C Shepherd, *The Law of Fiduciaries* (1981) 30; Michael Bryan, 'Parents as Fiduciaries' (1995) 3 *International Journal of Children's Rights* 227, 240.

only for the benefit of the child. However, as the scope and nature of fiduciary duties varies according to the context of particular facts,[64] equity can remain sensitive to the particular circumstances of each relationship. Indeed, that is equity's strength. Doubtless the imposition of fiduciary duties upon parents will require difficult line-drawing,[65] however, the line should not be drawn at a point that prevents the conduct of a parent who places their sexual desires over the physical and emotional interests of their child being the subject of fiduciary law.

Similarly, the 'integrity, credibility and utility' of the relationship between doctor and patient can be said to require the trust of the patient and a corresponding loyalty from the doctor. That there is a social expectation that doctors do not exploit their patients for personal gain may be seen in professional ethical standards.[66] Importantly, were the courts to restrict fiduciary obligations of doctors to economic interests, they would fail to recognise the nature of the powers that the doctor might be expected to use solely in the interests of the patient. Indeed, as *Freeman v Perlman*[67] shows, the control of economic interests may properly fall outside the scope of a doctor's fiduciary obligations. In that case, a doctor defaulted on a loan from a patient and subsequently went bankrupt. The British Columbia Court of Appeal held that as the doctor had no control over the patient's finances, there was no fiduciary relationship with respect to financial matters.[68] The opportunity for doctors to exploit the trust of their patients for personal gain exists most obviously in the examination and treatment of patients. This question has not been specifically addressed by Australian courts. There is, however, sufficient dicta in the judgments in *Breen v Williams*, both in the New South Wales Court of Appeal and the High Court, to suggest that, in appropriate circumstances, fiduciary obligations of doctors may extend to the treatment of patients.[69]

While this article will examine the protection of non-economic interests by fiduciary law in the context of the guardian-ward, parent-child and doctor-patient relationships, an approach to fiduciary law that encompasses non-economic interests may be applicable in many other relationships. Of particular relevance are those involving custody and care of children,[70] or the custody and care of people with an intellectual disability or mental illness, and professional

64 See *Hospital Products* (1984) 156 CLR 41, 102; *Boardman v Phipps* [1967] 2 AC 46, 125.

65 See Bryan, above n 63, 255-6.

66 See, eg, Australian Medical Association, *Code of Ethics* (1996), at<http://www.ama.com.au/html/ethics.html> (accessed 16 October 2001). This code prohibits the sexual, emotional or financial exploitation of patients [1.2.2], and requires that doctors disclose financial interests in institutions or services to which they refer patients [1.3.14].

67 (1999) 169 DLR (4th) 133.

68 Ibid 135-6.

69 *Breen v Williams* (1995) 186 CLR 71, 135-6 (Gummow J). See below n 118-121 and accompanying text. The course of argument also bears this out: Transcript of Proceedings, *Breen v Williams*, (High Court, 21 November 1995); *Breen v Williams* (1994) 35 NSWLR 522, 542-5 (Kirby J), 570 (Meagher J).

70 See *A(C) v Critchley* (1998) 166 DLR (4th) 475, 482 (McEachern CJ): '...I have no doubt everyone charged with responsibility for the care of children is under a fiduciary duty towards such children.' See also, *Lyth v Dagg* (1988) 46 CCLT 25, where a teacher was held liable in battery for sexual exploitation of a student. It is likely that such a claim brought in Canada today would also encompass a fiduciary claim.

counselling relationships, from psychiatrists[71] to clerics.[72] Others may arise. In each of these relationships, the existence, nature and scope of the duty must be analysed in accordance with the policy framework outlined above and moulded to the circumstances of each individual case. However, before this approach can be adopted, the courts must allow non-economic interests to fall within the scope of fiduciary duties. The following discussion outlines how this has occurred in Canada, and compares the approach in Australia.

II NON-ECONOMIC INTERESTS AND THE SCOPE OF FIDUCIARY OBLIGATIONS

Importantly, the refusal of Australian courts to use fiduciary law to protect non-economic interests has not been based on the classification of the relationships. *Paramasivam* involved the guardian-ward relationship, in which it is settled in Australia that fiduciary obligations may exist.[73] Further, the judges in *Williams* and *Cubillo* took such a broad view of the possible relationships in which fiduciary obligations might exist that they in essence avoided resolving the question.[74] However as Frankfurter J stated in *Securities Commission v Chenery Corporation*,[75] 'to say that a man is a fiduciary only begins analysis'. The critical point of analysis in the use of fiduciary law to protect non-economic interests is the question of scope. As noted above, the tests in *Hospital Products* and *Frame v Smith* both relate to the 'legal and practical' interests of the beneficiary. Thus, while the distinction between the treatment of economic and non-economic interests ultimately relates to differing conceptions about the role of fiduciary law, in one sense, it can be isolated to different conceptions of the term 'practical interests'.

A *The Canadian Approach*

In *Frame v Smith*, Wilson J explicitly defined interests to include 'vital non-legal or "practical" interests' which included those of both economic and non-economic character. Her Honour gave the example of the fiduciary relationship of director-company as protecting not only the legal or economic interests of the company, but also more 'intangible practical interests' in reputation and public image.[76] Her Honour argued that the English case of *Reading v R*,[77] in which a soldier was held

71 Obviously this is a subset of doctor-patient. It could be argued that the concepts that might make all doctor-patient relationships fiduciary in nature apply with greater force to the psychiatrist-patient relationship given the often heightened vulnerability.

72 See *Smith v Roman Catholic Archbishop of Perth* [2001] WASC 86, where a priest began a sexual relationship a wife seeking marriage counselling. In this case, the claim against the Archdiocese was struck out.

73 See above n 62. Note, in *Cubillo and Williams*, there is some uncertainty as to whether the statutory relationship between the plaintiffs and the Commonwealth and New South Wales governments respectively were in fact 'guardian-ward' relationships. However, whatever the technicalities of the statutes, the judges used this relationship as the vehicle through which to analyse the fiduciary claim.

74 *Williams* (1999) 25 Fam LR 86, 233-8; *Cubillo* (2000) 174 ALR 97, 497-505.

75 (1943) 318 US 80, 85-6. See *Pilmer* (2001) 75 ALJR 1067, 1083 (McHugh, Gummow, Hayne and Callinan JJ) and *Williams* (1999) 25 Fam LR 86, 233.

76 *Frame v Smith* (1987) 42 DLR (4th) 81, 99.

77 [1951] AC 507.

to be in breach of fiduciary obligations owed to the Crown for unauthorised use of his uniform, was an example of fiduciary law protecting the Crown's 'moral' interest in preventing the corrupt use of its uniform.[78] Wilson J also gave the example of the equitable remedy of specific performance in relation to land purchases as an indication of equity's role in protecting interests beyond the economic.[79]

Applying this wide concept of 'practical' interests to the case at hand, Wilson J considered that the 'non-custodial parent's interest in the relationship with his or her child is without doubt of tremendous importance to him or her.'[80] Such an interest was held to be just as worthy of protection as a corporation's interest in its corporate opportunities and other interests commonly protected by fiduciary obligations.[81] Acknowledging that a distinction could be drawn between the non-economic nature of the parent's interest and the economic nature of the corporation's interest, her Honour stated that to 'deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would ... be arbitrary in the extreme.'[82]

The rejection of the distinction between economic and non-economic interests has been followed without substantial debate in subsequent cases in the Supreme Court of Canada.[83] It is now accepted in Canada, even by those judges who are critical of some aspects of the expansive approach of the Canadian Supreme Court, that non-economic interests are capable of protection by fiduciary law.[84] Indeed many cases simply take this position for granted.[85] In *Norberg v Wynrib*, McLachlin J[86] stated that fiduciary principles

> are principles of general application, translatable to different situations and the protection of different interests than those hitherto recognized. They are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests.[87]

In that case, a doctor prescribed drugs to which his patient was addicted in return for sexual favours. McLachlin J held that the interest of a patient to receive treatment free from sexual exploitation at the hands of her doctor was a 'striking personal interest',[88] which 'constitute[d] a "vital and substantial 'practical'

78 *Frame v Smith* (1987) 42 DLR (4th) 81, 99-100. It should be noted that reliance on *Reading v R* is problematic. The case has been interpreted to fit within the fiduciary mould in other ways, such as misuse of property (see Glover, 'Identification of Fiduciaries', above n 34, 272-3) and maintaining the integrity of corporate structures (see Ernest Weinrib, above n 18, 14). The case has been criticised as a misapplication of fiduciary principles, occasioned by the reluctance of the court to acknowledge a more suitable claim for unjust enrichment: see Gatreau, above n 7, 6.

79 *Frame v Smith* (1987) 42 DLR (4th) 81, 104.

80 Ibid.

81 Ibid 103-4.

82 Ibid 104.

83 *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 484-507 (McLachlin J); *McInerney v MacDonald* (1992) 93 DLR (4th) 415; *M(K) v M(H)* (1992) 96 DLR (4th) 289.

84 See *A(C) v Crtichley* (1998) 166 DLR (4th) 475, 478-510 (McEachern CJ).

85 See, eg, *M(K) v M(H)* (1992) 96 DLR (4th) 289; *J(LA) v J(H)* (1993) 102 DLR (4th) 177.

86 L'Heureux-Dubé J concurring.

87 *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 499.

88 Ibid 490.

interest"... within the meaning of the second characteristic of a fiduciary duty set out in *Frame v Smith*.'[89] Other members of the Court declined to deal with the matter as a breach of fiduciary duty on the basis that the misconduct of the doctor could be better accommodated under contract[90] or tort[91] analysis, and did not address the question of whether fiduciary obligations could, or could not, protect non-economic interests. Subsequent cases of sexual exploitation within families have been held to fall within the ambit of fiduciary law.[92]

While only McLachlin J considered fiduciary law to be applicable in *Norberg v Wynrib*, a Full Court of the Supreme Court in *McInerney v MacDonald*[93] held that fiduciary obligations could exist in relation to non-economic interests. In finding that a doctor is under a fiduciary duty to provide his or her patients with access to their medical records, the court held that a person has a 'vital' interest in the information contained in the records due to its 'highly private and personal' nature 'that goes to the personal integrity and autonomy of the patient.'[94] While this may be seen to give rise to duties of confidentiality (which may exist as part, or independently, of any fiduciary duty), the main reason for the requirement that the records be accessible was the way in which the information is obtained by the doctor. The Court held that the patient 'entrusts' the information to their doctor who holds it in a trust-like fashion, the information remaining, in a sense, the patient's own.[95] Here, there is a clear attempt to invoke notions of property to give a quality to the interest that attracts fiduciary law.[96]

B *The Australian Approach*

The initial Australian judicial reaction to the Canadian developments was mixed. In *Williams (No 1)*, Kirby P, having referred to *M(K) v M(H)*, held that child abuse could be actionable as a breach of fiduciary duty.[97] Priestley JA cautiously agreed with the orders of Kirby P, noting that the case was 'pre-eminently ... of the kind where a broad approach should be taken to questions of arguability of legal propositions which may be novel but which require careful consideration in the light of changing social circumstances.'[98] In dissent, Powell JA held that as any abuse would be actionable in tort, there was no reason for the fiduciary action to be available.[99]

Kirby P was again the champion of Canadian fiduciary developments when *Breen v Williams* reached the New South Wales Court of Appeal.[100] His Honour found

89 Ibid 491.
90 Ibid 473-484 (Sopinka J).
91 Ibid 451-473 (La Forest J, Gonthier and Cory JJ concurring).
92 *M(K) v M(H)* (1992) 96 DLR (4th) 289; *J(LA) v J(H)* (1993) 102 DLR (4th) 177.
93 (1992) 93 DLR (4th) 415.
94 Ibid 422.
95 Ibid 424.
96 See Glover, 'Identification of Fiduciaries', above n 34, 272-3. Weinrib argues that there is a tendency of courts when 'confronted with such broad formulations, to reduce them to manageable legal proportions by invoking the notion of property' which then merely becomes a label for 'interests which the law deems worthy of protection': Weinrib, above n 18, 10.
97 (1994) 35 NSWLR 497, 510-11.
98 Ibid 516.
99 Ibid 519.
100 (1994) 35 NSWLR 522.

the reasoning in *McInerney v MacDonald* 'wholly convincing'[101] as he held that Dr Williams was under a fiduciary obligation to give Ms Breen access to her medical records. In this case, however, Kirby P was in the minority. In separate concurring judgments, Mahoney JA and Meagher JA disapproved of the position in *McInerney v MacDonald*, finding that fiduciary law imposed no obligation to provide medical records,[102] a decision upheld on appeal to the High Court.[103]

Whatever momentum was created by Kirby P towards the expansion of fiduciary obligations, it was, according to recent decisions, dashed by the High Court in *Breen v Williams*. In *Paramasivam*, the Court declined to follow the decision in *Williams (No 1)* as to the arguability of fiduciary claims for child abuse on the ground that that case preceded *Breen v Williams*.[104] The Court in *Paramasivam* held that the failure of the plaintiff in *Breen v Williams* to use fiduciary law to protect a non-economic interest reinforced the idea that in 'Anglo-Australian law, the interests which the equitable doctrines invoked by the appellant, and related doctrines, have hitherto protected are economic interests.'[105] Having found himself not bound by *Williams (No 1)*,[106] Abadee J in *Williams* stated he did 'not see why any fiduciary relationship should ... give rise to greater duties than those involving protecting economic interests.'[107] In contrast to *Paramasivam*, O'Loughlin J in an interlocutory judgment in *Cubillo*, found that the law was not sufficiently settled to prevent the arguability of a fiduciary claim arising in connection to physical or emotional harm.[108] However at trial, his Honour applied *Breen v Williams* and *Paramasivam* to assert that it 'would appear to be inappropriate for a judge at first instance, to expand the range of the fiduciary relationship so that it extends ... to a claimed conflict of interests where the conflict did not include an economic aspect.'[109]

[101] Ibid 545.
[102] *Breen v Williams* (1994) 35 NSWLR 522, 566-7 (Mahoney JA), 569-70 (Meagher JA).
[103] *Breen v Williams* (1996) 186 CLR 71.
[104] *Paramasivam* (1998) 90 FCR 489, 507.
[105] Ibid 504.
[106] *Williams* (1999) 25 Fam LR 86, 101, 231. This finding was questioned by Rolfe J in *Johnson v Department of Community Services* (2000) Aust Torts Reports ¶81-540, 63, 494.
[107] *Williams* (1999) 25 Fam LR 86, 238.
[108] *Cubillo (No 1)* (1999) 89 FCR 528, 575-6.
[109] *Cubillo* (2000) 174 ALR 97, 508. While the use of the word 'aspect' may indicate that the interest protected need not be economic, so long as the fiduciary takes an 'economic' benefit from the conflict of interest, it is apparent from the judgment that the focus is on the nature of the interest sought to be protected.

III IS THE AUSTRALIAN APPROACH JUSTIFIED?

Three propositions underlie the reluctance to apply fiduciary law in respect of non-economic interests in the post-*Breen v Williams* era. Firstly, that the High Court, in rejecting the applicability of fiduciary law in respect of a patient's interest in obtaining their medical records, rejected the possibility that any non-economic interests could be the subject of a fiduciary duty.[110] Secondly, that the approach in Canada in respect of non-economic interests distorts the traditional role of fiduciary obligations by imposing positive duties on fiduciaries to act in the best interests of beneficiaries.[111] Thirdly, that the protection of non-economic interests is within the exclusive realm of contract and tort law.[112]

A *Did Breen v Williams Reject the Possibility that Fiduciary Law Could Protect Non-economic Interests?*

The first and most obvious criticism of the way in which *Breen v Williams* has been relied upon to reject fiduciary claims in respect of all non-economic interests is that the High Court in *Breen v Williams* specifically addressed itself to the interest claimed in that case, that of a patient in obtaining medical records from her doctor.[113] Apart from a rejection of the idea that the patient had a trust-like interest in the records,[114] there is little analysis of the nature of a patient's interest in the records. Further, there is no effort to distinguish the interest as economic or not, and no suggestion that such a distinction be determinative of fiduciary claims. Indeed, Gaudron and McHugh JJ recognised an ability of patients in certain circumstances to 'restrain ... improper use' of medical records, indicating that equitable obligations, perhaps including fiduciary obligations, may arise in relation to medical records.[115]

Significantly, it was not the nature of the interest in the records, but the idea that fiduciary law could grant a patient a right of access to, or a corresponding duty upon a doctor to provide, medical records, that figured most notably in the rejection of the fiduciary claim. The emphasis in all of the judgments is that Australian fiduciary law does not impose positive duties on fiduciaries to act in

110 *Paramasivam* (1998) 90 FCR 489, 507-8. Note, at 505 the court asserts that academic writing proceeds on the basis that the interests protected by fiduciary law are economic, citing inter alia, Finn, 'The Fiduciary Principle', above n 33. However Finn states at 26 that the fiduciary principle is 'used to protect interests, both personal and economic, which a society is perceived to deem valuable'. See also *Williams* (1999) 25 Fam LR 86, 238-9; *Cubillo* (2000) 174 ALR 97, 504-6, 508.

111 *Paramasivam* (1998) 90 FCR 489, 507-8; *Williams* (1999) 25 Fam LR 86, 239; *Cubillo* (2000) 174 ALR 97, 503-5.

112 *Paramasivam* (1998) 90 FCR 489, 504-8; *Williams* (1999) 25 Fam LR 86, 239-42; *Cubillo* (2000) 174 ALR 97, 503-4, 508-9. While the Full Court of the Federal Court in *Cubillo* generally endorsed O'Loughlin J's approach to the fiduciary question, the court emphasised this aspect in particular. Indeed, the Full Court's voice on this issue was clearer than that of the trial judge: *Cubillo v Commonwealth* [2001] FCA 1213, [466].

113 Nicholas Mullany, 'Civil Actions for Childhood Abuse in Australia' (1999) 115 *Law Quarterly Review* 565, 569.

114 This being necessary to reject the submission that *McInerney v MacDonald* should be followed. See *Breen v Williams* (1995) 186 CLR 71, 111 (Gaudron and McHugh JJ).

115 *Breen v Williams* (1995) 186 CLR 71, 111 (Gaudron and McHugh JJ), citing *W v Egdell* [1990] Ch 359, 389, 415, 419.

the best interests of beneficiaries.[116] Whether the imposition of positive duties is a feature of Canadian fiduciary law generally will be analysed later. At this stage, however, it is submitted that the imposition of positive duties is a feature of *McInerney v MacDonald*, which led to that case not being applied in *Breen v Williams*. The clear position reached in *Breen v Williams* is that assuming an interest is capable of protection, fiduciary law must relate to the restraint of conduct which constitutes a conflict of interest or unauthorised profit.[117] However, such a conclusion does not depend on the nature, economic or otherwise, of the interest over which a conflict might exist.

The one judge in *Breen v Williams* who was prepared to classify the doctor-patient relationship as prima facie fiduciary in nature, Gummow J, gave examples of instances where such a conflict may exist in the doctor-patient relationship. He argued that doctors might be in breach of fiduciary obligations if they advised a patient to undergo treatment at a private hospital in which they had an undisclosed financial interest, or prescribed a certain pharmaceutical medication in favour of other suitable drugs because of an undisclosed benefit from the manufacturer.[118] His Honour also cited as an example the case of *Moore v Regents of the University of California*,[119] in which a doctor commercially exploited bodily substances removed from his patient.[120]

In these examples, the unauthorised profit supplies a clear economic component. However, from the patient's point of view, the interest that has been violated is a non-economic one: an interest in receiving treatment and advice unclouded by the personal interests of the doctor. In short, the patient's interest is in their health. Thus, were fiduciary law to act in these cases, it would be protecting a non-economic interest of the patient. Indeed, Gummow J used the fact that 'the efforts of the medical practitioner may have a significant impact not merely on the economic but upon the fundamental personal interests of the patient' as a basis for classifying the relationship as fiduciary.[121] Thus, it is difficult to conclude that there is not 'anything to be found in *Breen* to support the proposition that fiduciary principles may be invoked to protect other than economic interests.'[122]

B *Does the Canadian Approach to Fiduciary Law in Respect of Non-economic Interests Impose Positive Obligations?*

A recurring theme in Australian fiduciary law is that the duties imposed on a fiduciary are described in proscriptive terms. To paraphrase Deane J in *Chan v*

[116] *Breen v Williams* (1995) 186 CLR 71, 83 (Brennan CJ), 93-5 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ), 135-8 (Gummow J).
[117] See ibid 135 (Gummow J).
[118] Ibid 136. See also *Breen v Williams* (1995) 186 CLR 71, 93-4 (Dawson and Toohey JJ). These statements correspond to the ethical duties placed upon doctors: Australian Medical Association, above n 66.
[119] (1990) 793 P 2d 479.
[120] *Breen v Williams* (1995) 186 CLR 71, 136. For more examples of instances in which doctors may act in a conflict between their interests and those of their patients, see Michalik, above n 36, 181-5.
[121] *Breen v Williams* (1995) 186 CLR 71, 134-5.
[122] *Williams* (1999) 25 Fam LR 86, 239 (Abadee J).

Zacharia, a fiduciary must account for any gain[123]

(a) obtained by the fiduciary or a third party in circumstances where a conflict or significant possibility of conflict existed between his or her fiduciary duty and his or her personal interest; or
a) obtained by the fiduciary or a third party by use or by reason of his or her position or opportunity or knowledge arising from that position.[124]

As Finn argues, the fiduciary obligation exacts a high standard of loyalty, but 'no more than loyalty is exacted.'[125] It is clear that not every breach of duty by a fiduciary will be a breach of fiduciary duty; negligence by a solicitor,, is just that.[126] In being obliged to act in the interests of the beneficiary, the fiduciary fulfils their obligations by refraining from acting in their own interests, or those of a third party. There is no overarching duty to perform positive acts to ensure that the beneficiary's interests have actually been served.[127]

As noted above, the High Court in *Breen v Williams* considered that a duty imposed upon a doctor to provide access to medical records is a positive duty, and on that basis, rejected the position in *McInerney v MacDonald.*[128] Subsequently, recent Australian cases have seemingly arrived at the conclusion that all Canadian developments in relation to non-economic interests have adopted a prescriptive approach to fiduciary obligations, and therefore must be rejected. This is partly a result of the imprecise language used in the Canadian judgments. For example, the parental fiduciary duty has been described in terms of a general duty to act in the best interests of the child.[129] Further, there have been some instances in Canada where positive duties have been imposed in relation to non-economic interests. *McInerney v MacDonald* is one example. Another is *J(LA) v J(H)*, where a mother was held to be in breach of fiduciary obligations to her daughter for failing to take steps to prevent the sexual abuse perpetrated by her husband on her daughter.[130]

Another factor is the way in which the Canadian developments were first applied in Australia. Having referred to *M(K) v M(H)*, Kirby P in *Williams (No 1)* held that it was arguable that a beneficiary could 'recover equitable compensation from [a] fiduciary for the losses occasioned by the want of proper care'.[131] By describing the breach in terms of 'want of care' rather than 'conflict of interest', Kirby P provided ammunition to those who consider that an action brought for

123 Not only is the fiduciary liable to account for any such gains, but they may be liable, in the alternative, for any losses sustained by the beneficiary as a result of the breach of fiduciary duty: *Nocton v Lord Ashburton* [1914] AC 932.
124 (1984) 154 CLR 178, 198-9. See also Finn 'The Fiduciary Principle' above n 33, 27.
125 Finn, 'The Fiduciary Principle', above n 33, 28. Finn makes an exception for 'fiduciary powers', which he describes more fully in Finn, *Fiduciary Obligations*, above n 52, 8-77.
126 See, eg, *Hill v Van Erp* (1997) 188 CLR 159. See also *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362 (Southin J).
127 Finn, 'The Fiduciary Principle', above n 33, 28.
128 See above n 116.
129 See, eg, *M(K) v M(H)* (1992) 96 DLR (4th) 289, 326; *J(LA) v J(H)* (1993) 102 DLR (4th) 177, 185-6.
130 (1993) 102 DLR (4th) 177.
131 *Williams (No 1)* (1994) 35 NSWLR 497, 511.

breach of fiduciary duty to cover losses from abuse is indistinguishable from a tort action arising out of the same facts.

The most significant factor, however, is that Australian courts have not distinguished those aspects of the Canadian fiduciary approach which tend towards the imposition of positive duties, from those that protect non-economic interests. Instead, the treatment of the Canadian approach has been restricted to generalisations which misrepresent the developments in that jurisdiction. Statements in *Breen v Williams* to the effect that the Canadian notion of fiduciary duty does not 'accord with the law of fiduciary duty as understood in this country'[132] have been taken out of their context of disputing the imposition of positive duties, to pose a general notion of divergence between Australian and Canadian fiduciary law.[133] However, there is no necessary connection between the type of interest sought to be protected, and the nature of the obligation in relation to that interest.

The conduct which constituted breaches of fiduciary duty in *M(K) v M(H)* and that which was considered by McLachlin J in *Norberg v Wynrib* to constitute a breach of fiduciary duty can be considered under both of the proscriptive rules identified by Deane J in *Chan v Zacharia*. The father in *M(K) v M(H)* and the doctor in *Norberg v Wynrib* can be seen to have pursued their interests in sexual gratification over the sexual autonomy, and physical and emotional health of the daughter and patient. Thus, so long as such interests can constitute the subject matter of a fiduciary duty, the father and doctor can be seen to have placed themselves in a position where their interest and duty conflicted. Similarly, they can be seen to have taken personal advantage of the fiduciary position. The father, in his role as custodian, and the doctor, through his ability to prescribe medication, used their positions not for the benefit of the child or patient, but for their own benefit. Having acted in their own interests, fiduciary liability within the proscriptive rules can be shown without any need to establish a 'failure' to act in the best interests of the beneficiary. Importantly, the nature of the interest being protected does not prevent the duty being described in proscriptive terms.

Recent Canadian decisions further illustrate that the nature of the interest sought to be protected is a separate question to the nature of the fiduciary duty. These decisions have attempted to clarify the operation of fiduciary law where non-economic interests are at stake by adopting a strictly proscriptive approach. In *A(C) v Critchley*,[134] the British Columbia Court of Appeal held that the Crown was not directly liable for breach of fiduciary duty arising out of the sexual abuse suffered by wards of the state at the hands of a foster parent. The main allegations against the Crown related to failures to adequately monitor the foster parent. Ryan J emphasised that a 'fiduciary does not breach his or her duties by simply

[132] *Breen v Williams* (1995) 186 CLR 71, 83 (Brennan CJ). See also *Breen v Williams* (1995) 186 CLR 71, 95 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ).

[133] *Paramasivam* (1998) 90 FCR 489, 507-8. See also *Williams* (1999) 25 Fam LR 86, 239; *Cubillo* (2000) 174 ALR 97, 503-5. See also Shaunnagh Dorsett, 'Comparing Apples and Oranges: The Fiduciary Principle in Australia and Canada after *Breen v Williams*' (1996) 8 *Bond University Law Review* 158. This tendency is noted and criticised by Mullany, above n 113, 569.

[134] (1998) 166 DLR (4th) 475.

failing to obtain the best result for the beneficiary'[135] and McEachern CJ commented that the reach of fiduciary law should be restricted to cases where the fiduciary 'personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage.'[136] A similar approach was taken by the same Court in *B(KL) v British Columbia*.[137] Noting that sexual assault by a parent, as a gross betrayal of the trust relationship, is properly characterised as a breach of fiduciary duty, the court held that '[n]egligent supervision ... while it is actionable as a tort, does not involve a similar conflict of duty and self-interest.'[138] Such a finding is of particular significance to cases such as *Williams* and *Cubillo*, as a proscriptive approach makes it difficult to establish direct fiduciary liability on the Crown for wrongs committed by guardians. Failures to supervise do not translate well into conflicts of interest.

Whether liability can be placed on the Crown may depend on considerations of vicarious liability, breach of non-delegable statutory duty,[139] or knowing assistance.[140] In *A(C) v Critchley*, McEachern CJ regarded the fiduciary liability of the foster parent (not contested by the Crown) to be obvious.[141] The Crown was held to be vicariously liable for the 'unlawful misconduct' of the foster parent.[142] It is unclear from this case, and others where similar language is used,[143] whether 'misconduct' relates to the tort or breach of fiduciary duty. However, in citing authority on vicarious liability involving torts, the court appeared to focus on the tort committed by the foster parent.[144] Whether the imposition of vicarious liability for breaches of fiduciary duty is appropriate in such circumstances requires careful analysis and feeds into broader policy questions of whether employers should be held liable for sexual assaults committed by employees in the course of their work.[145]

135 Ibid 514.
136 Ibid 500.
137 (2001) 5 WWR 47.
138 Ibid 59 (Mackenzie JA).
139 See, eg, *B(WR) v Plint* [2001] BCSC 997, [254]-[259]. For statements as to the Australian position on non-delegable duty in relation to negligence, see *Kondis v State Transport Authority* (1984) 154 CLR 672, 685-6, 687; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 550-1. See also Marfording, above n 9, 229-30.
140 Under the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244. This seems to have been pleaded in *Cubillo*. In para 40A of Lorna Cubillo's and para 61A of Peter Gunner's statement of claim, the plaintiffs alleged the Commonwealth '"knowingly participated in the breaches of fiduciary duty" that were allegedly committed by the directors': *Cubillo* (2000) 174 ALR 97, 500. However, this issue was not addressed by O'Loughlin J, perhaps owing to the finding that there was no primary fiduciary breach, and that, when discussing vicarious liability in tort, his Honour held that the Commonwealth did not know of assaults committed on the plaintiffs nor the perpetrators' tendency to commit such assaults: at 490-1.
141 *A(C) v Critchley* (1998) 166 DLR (4th) 475, 502.
142 Ibid 502-7.
143 See *B(M) v British Columbia* [2001] 5 WWR 6, 17-23.
144 *A(C) v Critchely* (1998) 166 DLR (4th) 475, 502-7.
145 See Marfording, above n 9, 230. In Canada, strong policy considerations lay behind the leading decision imposing vicarious liability on employers for child abuse by their employees: *B(PA) v Curry* (1999) 62 BCLR (3d) 173. For a discussion of issue in the Canadian and English contexts respectively, see Nathalie Des Rosiers, 'From Precedent to Prevention - Vicarious Liability for Sexual Abuse' (2000) 8 *Tort Law Review* 27, Richard Townshend-Smith 'Vicarious Liability for Sexual (and other) Assaults' (2000) 8 *Tort Law Review* 108.

Importantly, the court in these cases did not dispute that a plaintiff's; or plaintiffs' non-economic interests could be protected by fiduciary law. Where the defendant is the alleged fiduciary and perpetrator of the conduct, cases such as *A(C) v Critchely* and *B(KL) v British Columbia* highlight the significance of separating the question of whether non-economic interests can be protected by fiduciary law from the question of whether fiduciary law should impose prescriptive obligations. They also show that the protection of non-economic interests can occur within the proscriptive model of fiduciary law favoured by Australian courts.

Having established that the proscriptive/prescriptive distinction need not correlate with the economic/non-economic distinction, it is worth noting that the proscriptive/prescriptive distinction is not without its difficulties. As Kirby J noted in *Pilmer*, the viability of the dichotomy may be questioned as 'omissions frequently shade into commissions'.[146] The case of *J(LA) v J(H)* provides an example. While the court can be seen to have imposed a positive duty on the mother to inform public authorities of her daughter's abuse, the court held that by deciding not to inform the authorities (indeed, the court held that she actively deflected the Children's Aid Society),[147] the mother gave her own interests in preserving the family unit paramountcy over the interests of her daughter.[148] Despite the difficulties, however, the proscriptive label operates as a useful shorthand in identifying the central theme of fiduciary law: the prevention of conflicts of interest and abuses of positions of trust. It is this theme that gives fiduciary law its distinct nature, and imbues breaches of fiduciary duty with a different quality to breaches in tort and contract. However, Australian courts tend to be of the view that fiduciary law will act as a surrogate tort law if it protects non-economic interests.[149] In order to establish an analytically satisfying demarcation between fiduciary law and the realms of tort and contract, however, one must look past the labels of 'economic' and 'non-economic' to assess the nature of the breaches in these cases.

C *Does Fiduciary Law Add Nothing to Existing Doctrines of Contract and Tort Law in Relation to Non-economic Interests?*

In *Breen v Williams*, Dawson and Toohey JJ asserted that the fiduciary concept in Canada ran the risk of 'displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong.'[150] As shown above, Canadian fiduciary law in respect of non-economic interests is not inextricably linked to the imposition of positive duties. However, such comments have had the effect of simplistically characterising the Canadian approach as being inconsistent with the relationship of fiduciary law to other causes of action. It is said, without detailed analysis, that

[146] (2001) 75 ALJR 1067, 1092.
[147] *J(LA) v J(H)* (1993) 102 DLR (4th) 177, 184.
[148] Ibid 184-6.
[149] See above n 112. See also Bryan, above n 63, 255.
[150] *Breen v Williams* (1995) 186 CLR 71, 95; see also 83 (Brennan CJ), 113 (Gaudron and McHugh JJ).

the Canadian approach in respect of non-economic interests fails to pay sufficient regard to the traditional realms of contract and tort law.[151] The recent Australian cases have consistently indicated that the law of torts, and where applicable, contract,[152] defines the limits of the law's capacity to establish civil liability for injuries to the person.[153]

In *Paramasivam*, *Williams* and *Cubillo*, the allegations of breach of fiduciary duty on the basis of wrongs inflicted on children ran concurrently with traditional claims in tort arising out of the same facts. In *Williams* and *Cubillo*, the novel fiduciary claim assisted the plaintiffs in overcoming limitations statutes.[154] This use of fiduciary law has unfortunately clouded opinion as to the legitimacy of the claims. Some courts and commentators have regarded such claims as an artificial device.[155] It is true that the most preferable solution to injustices caused by limitation statutes is to reform the statutes, rather than manipulate and distort ill-suited doctrines to evade their provisions.[156] However, this fact should not obscure analysis of whether fiduciary law has a discrete and important role to play in protecting non-economic interests. One might accept the oft-repeated statement of Sopinka J in *Norberg v Wynrib* that '[f]iduciary duties should not be superimposed on ... common law duties simply to improve the nature or extent of the remedy.'[157] However, in appropriate circumstances, it is argued that breach of fiduciary duty can be a valid cause of action for wrongs inflicted in relation to non-economic interests irrespective of procedural or remedial advantages.

As a starting point, it is important to recognise that it is accepted by the courts that fiduciary duties can exist alongside obligations in tort and contract.[158] For example, company directors are generally engaged by contracts, and owe a duty of care in equity and tort,[159] in addition to fiduciary duties. Further, as Kirby P

151 *Paramasivam* (1998) 90 FCR 489, 505-8; *Williams* (1999) 25 Fam LR 86, 239-40; *Cubillo* (2000) 174 ALR 97, 503-5.

152 Where the contract relates to the treatment of the body, such as in the doctor-patient scenario.

153 See above n 112.

154 See *Williams (No 1)*, (1994) 35 NSWLR 497, 509, 515; *Cubillo (No 1)* (1999) 89 FCR 528, 584; *Cubillo* (2000) 174 ALR 97, 544-5. The fiduciary argument did not assist the plaintiff in *Paramasivam* as in the ACT the same limitation period applies to claims in tort and equity: see above n 10. Limitation issues are a common feature of claims arising out of wrongs inflicted on children, particularly sexual abuse, as such claims are most often brought by adult survivors well after they have reached the age of majority: Marfording, above n 9, 221. In claims relating to the Stolen Generation, a lack of access to records has been identified as contributing to the delay in making claims: Melissa Abrahams, 'A Lawyer's Perspective on the Use of Fiduciary Duty with Regard to the Stolen Children' (1998) 21 *University of New South Wales Law Journal* 213, 214-5.

155 See, eg, *Paramasivam* (1998) 90 FCR 489, 506. See also Bryan, above n 63, 247; Mullany, above n 113, 566.

156 Bryan, above n 63, 255. For an example of reforms in relation to child sexual abuse, see the reforms in British Columbia, above n 9. For other reform proposals, see Marfording, above n 9, 252-3.

157 *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 481. See *Breen v Williams* (1995) 186 CLR 71, 110 (Gaudron and McHugh JJ); *Pilmer* (2001) ALJR 1067, 1082 (McHugh, Gummow, Hayne and Callinan JJ); *Cubillo v Commonwealth* [2001] FCA 1213, [466]. Abadee J in *Williams* took this notion one step further in declaring that fiduciary law should not 'convert an unsustainable claim at common law, based on the same facts, into a sustainable one in equity': *Williams* (1999) 25 Fam LR 86, 242.

158 *Paramasivam* (1998) 90 FCR 489, 508. See also *Hospital Products* (1984) 156 CLR 41, 97 (Mason J); Pilmer (2001) ALJR 1067, 1082; Meagher, Gummow and Lehane, above n 8, 160.

159 *Daniels v Anderson* (1995) 16 ACSR 607.

stated in *Wickstead v Browne*, it 'is by no means uncommon for equity and the common law to provide different causes of action and different remedies for the same facts.'[160] The most obvious example arises where a contract clearly establishes a duty upon one party to act as a fiduciary. A breach of the fiduciary duty may also be a breach of the contract. Importantly, it should be acknowledged that '*rivalry* between principles, as opposed to a study of their interaction and interrelation, is unlikely to be productive.'[161]

To argue that fiduciary law can add nothing to existing tort or contract law where non-economic interests are concerned overlooks much about the nature of wrongs committed in relationships of trust. As McLachlin J argues in *Norberg v Wynrib*, where a power imbalance is abused, 'characterizing the duty as fiduciary does add something; indeed, without doing so the wrong done to the plaintiff can neither be fully comprehended in law nor adequately compensated in damages.'[162] In the case of doctors, while tort and contract law can address failures in the provision of treatment, they are not apt to capture the exploitation which arises where a doctor abuses their position of trust for sexual gratification.[163] The doctor's actions constitute something more than just a failure to take reasonable care or to provide treatment as promised. The doctor's conduct not only suits the fiduciary rhetoric of betrayal,[164] but evokes a concept central to fiduciary obligations: the wrongful pursuit of self-interest.[165]

The same can be said of parents and guardians who sexually abuse children in their care. It is submitted that the wrong in such instances is of a different nature than where a stranger molests a child. The actions of both the stranger and parent are a heinous violation of the child's bodily integrity. However, in addition, such conduct by a parent violates the trust the child, and society, places in them to care for and nurture the child. As Flannigan argues, '[w]e expose ourselves to our fiduciaries in ways that we would never expose ourselves to others. This trust and exposure make the act far more offensive than the same act by one who has been kept at arms length.'[166] Nowhere is this more evident than where a child is abused by a parent.

Empirical research indicates that incestuous child abuse has certain distinct features. The abuse often happens over a long period of time,[167] and requires the

160 (1992) 30 NSWLR 1, 7 (dissenting).

161 *Hill v Van Erp* (1997) 188 CLR 159, 231 (Gummow J), quoting Francis Reynolds, 'Contract and Tort: The View from the Contract Side of the Fence' (1993) 5 *Canterbury Law Review* 280, 281 (emphasis in original).

162 (1992) 92 DLR (4th) 449, 500 (emphasis in original).

163 Ibid 499-500.

164 For comments on the use of rhetoric in fiduciary law, see Glover, *Commercial Equity: Fiduciary Relationships*, above n 22, 19-21.

165 Where a fiduciary owes conflicting duties, a breach of fiduciary duty can occur without self-interested conduct. In this situation, the concept may be rephrased as 'the wrongful pursuit of a rival interest.'

166 Flannigan, 'Fiduciary Regulation of Sexual Exploitation', above n 24, 306.

167 Donald Fischer and Wendy McDonald, 'Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse' (1998) 22 *Child Abuse and Neglect* 915, 917, 926-7.

manipulation of almost all aspects of the child's relationship with the perpetrator and other members of the family. In many cases, a father[168] forms a particular bond with the child, giving her special attention and gifts,[169] progressively 'isolating her from her mother'.[170] The father gradually sexualises the relationship by using opportunities to bath or put the child to bed to move from innocent to sexual touching.[171] As the child's awareness of the wrongful nature of the conduct develops, the father maintains the child's secrecy by continuing to give her special attention, in combination with threats or efforts to make her feel responsible for the conduct.[172] The father may place the burden of maintaining the family unit on the child by telling her that her secrecy is the only way the unit can be maintained.[173] As Des Rosiers states, the 'traditional sources of comfort and guidance, one's parents or guardians, are part of the problem and therefore inaccessible for the solution.'[174] Further, the conduct directly damages the child's ability to trust people in positions of care and authority.[175] This violation of trust should not be overlooked; it is often considered more harmful than the sexual activity itself.[176] It is difficult to escape thinking that the father has used the special access and emotional dependency provided by his position to further his selfish interests in perpetrating the abuse.

Compare this to the position of a stranger. Significantly, the stranger is not placed in a position, by society, to care for and nurture the child. A stranger neither has the same level of access to the child, nor the emotional control that can be exercised by a parent. Whilst the stranger may use threats, he or she cannot manipulate the child's relationship with his or her family in the same way as a parent, thus leaving open the most crucial avenue of support. Never having been placed in a position of trust, the stranger has not violated a position of trust. His or her relationship with the child cannot be regarded as fiduciary. Consequently, a stranger's liability under the civil law can exist only in tort.

To further illustrate the point, consider the situation where a parent injures his or her child as a result of negligent driving. Clearly the elements of trust that might characterise the relationship as fiduciary are present. However, unlike the case with abuse, the parent has not caused injury to the child by placing his or her

168 This narrative involves the example of a father abusing his daughter. The author is aware that this is not the only pattern of intra-familial sexual abuse.

169 See, eg, *J(LA) v J(H)* (1993) 102 DLR (4th) 177, 179.

170 Patrick Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345, 363; Jon Conte, Steven Wolf and Tim Smith, 'What Sexual Offenders Tell Us About Prevention Strategies' (1989) 13 *Child Abuse and Neglect* 293, 297.

171 Michele Elliott, Kevin Browne and Jennifer Kilcoyne, 'Child Sexual Abuse Prevention: What Offenders Tell Us' (1995) 19 *Child Abuse and Neglect* 579, 585-6; Conte, Wolf and Smith, above n 170, 300; Patricia Phelan, 'Incest and Its Meaning: The Perspectives of Fathers and Daughters' (1995) 19 *Child Abuse and Neglect* 7, 9-12. See, eg, *C(P) v C(R)* (1994) 114 DLR (4th) 151, 154-5.

172 Conte, Wolf and Smith, above n 170, 297-8; see, eg, *M(K) v M(H)* (1992) 96 DLR (4th) 289, 294.

173 *M(K) v M(H)* provides an example. In that case, the father 'threatened that disclosure would cause her mother to commit suicide, the family would break up, nobody would believe her, and finally that he would kill her': *M(K) v M(H)* (1992) 96 DLR (4th) 289, 293 (La Forest J).

174 Des Rosiers, 'Childhood Sexual Abuse' above n 15, 203.

175 Ibid.

176 See, eg, *C(P) v C(R)* (1994) DLR (4th) 151, 172-3. Phyllis Coleman, 'Sex in Power-Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex' (1988) 53 *Albany Law Review* 95, 101.

interests above those of the child. The parent has merely failed to fulfil the standard of care which tort law imposes on every driver towards their passengers. A comparable situation can be seen where a solicitor negligently fails to file an appearance within the prescribed time. Neither case involves the pursuit of self-interest or rival interests. Neither is a breach of fiduciary obligations, though such obligations may exist in the relationship.[177]

These examples demonstrate that within relationships where fiduciary obligations may arise, the factor which separates conduct purely within the realm of tort or contract from that which may constitute a breach of fiduciary duty, is that the conduct takes the form of a conflict of interest. In the cases of sexual exploitation, for example, it is evident that the conflict of interest adds a quality to the wrong that cannot adequately be comprehended by existing doctrines of tort and contract law. It is more than a device for evading limitation statutes. Further, focusing on the presence of a conflict of interest provides a much more conceptually satisfying distinction than that between economic and non-economic interests, and one more consistent with the nature and function of fiduciary obligations.

IV REMEDIES

Having denied fiduciary liability in respect of non-economic interests, Australian courts have not had to address the question of remedies. In limited cases, such as where a doctor receives an undisclosed profit from a pharmaceutical company, an account of profits may be appropriate.[178] However, in the majority of cases involving non-economic interests, the plaintiff will be claiming equitable compensation for loss flowing from the breach of fiduciary duty.[179] The key issue is how the calculation of equitable compensation might differ from tort or contract damages. There are two components to this question. Firstly, whether the breach of the trust relationship can be considered an independent source of loss. Secondly, whether common law limitations on recovery apply. Drawing on the discussion in Canadian cases, and the approach of Australian courts to equitable compensation where economic interests are concerned, some preliminary observations may be made.

In *M(K) v M(H)*, La Forest J, for the majority, considered that in the context of

[177] The requisite element of conflict could arise in this situation concerning the parent's control over the legal interests of the child. The parent may waive the child's rights to sue the insurer in return for a settlement. Such situations have been held to be breaches of the parental fiduciary duty in some jurisdictions in the United States: see, eg, *Ohio Casualty Insurance Co v Mallison* 534 P 2d 800 (Oregon, 1960); *Fitzgerald v Newark Morning Ledger* Co 267 A 2d 557 (New Jersey, 1970). See Bryan, above n 63, 240-1.

[178] See Michalik, above n 36, 184-5.

[179] On equitable compensation generally, see Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349; Justice William Gummow, 'Compensation for Breach of Fiduciary Duty' in T Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), 57-92. On the approach in Canada, see J Derek Davies 'Equitable Compensation: "Causation, Foreseeability and Remoteness"' in Donovan Waters, Maryla Waters and Mark Bridge (eds), *Equity, Fiduciaries and Trusts 1993* (1993), 297-324.

child abuse, both tort and equity have the same policy basis of seeking 'to compensate the victim for her injuries and to punish the wrongdoer.'[180] His Honour argued that absent different policy considerations, the quantum should be the same, a position previously adopted in the commercial context of *Canson Enterprises Ltd v Boughton & Co.*[181] This approach relies upon a convergence of equity and the common law[182] which is not accepted in Australia.[183] By contrast, McLachlin J questioned the conclusion that the causes of action have the same policy objectives.[184] Her Honour emphasised that damage to the trust relationship, so integral to the abuse, was something that only equity could address.[185] McLachlin J had previously stated in Canson that 'equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.'[186] This approach underpinned McLachlin J's decision in *Norberg v Wynrib* to award $25,000 for 'sexual exploitation' in addition to the compensation awarded for the perpetuation of her addiction and punitive damages.[187]

It may be argued that the particular psychological injuries caused by the context of incestuous child abuse (for example, damage to the trust relationship) will form part of the loss, whether calculated under principles of tort or equity.[188] However, one need not adopt the view that damage to the relationship should operate as an independent source of loss in order to appreciate the practical significance of how the court characterises the conduct. If the conduct is recognised as a breach of fiduciary duty, acknowledging the 'breach of trust' as a key component of the conduct focuses the court's attention on its effect on the child. Characterising the conduct as a tort, however, overlooks this crucial aspect, and may lead to its marginalisation during considerations of loss.

The likely area of contention, however, is not in how the plaintiff's loss is to be assessed, but the rules which establish the extent of the defendant's liability for that loss. Australian courts, in the economic context, have used the differences acknowledged by McLachlin J in *Canson* to resist invoking common law limitations such as foreseeability and remoteness of harm, and mitigation of loss, on recovery in cases of a breach of an equitable duty.[189] In particular, the High

180 *M(K) v M(H)* (1992) 96 DLR (4th) 289, 337. Note, Glover argues that equitable compensation is calculated on a restitutionary, rather than compensatory basis: see Glover, *Fiduciary Relationships*, above n 22, 264. See also Davidson, above n 179, 351.

181 Ibid, citing *Canson Enterprises Ltd v Boughton & Co* (1992) 85 DLR (4th) 129, 152 ('*Canson*'). This position was followed in *J(LA) v J(H)* (1993) 102 DLR (4th) 177.

182 *Canson* (1992) 85 DLR (4th) 129, 148-9, citing *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 924-5 (Diplock J).

183 *Pilmer* (2001) ALJR 1067, 1084-5; *Maguire v Makaronis* (1997) 188 CLR 449, 467-75. Much of the confusion arises due to the frequent situations where no difference in award is warranted. As Davidson states, however, '[a]lthough compensation in Equity will often produce the same result as damages the common law and equitable remedies utilise different rules to achieve the similar goal of compensating a plaintiff': Davidson, above n 179, 352.

184 *M(K) v M(H)* (1992) 96 DLR (4th) 289, 340.

185 Ibid.

186 (1992) 85 DLR (4th) 129, 154.

187 (1992) 92 DLR (4th) 449, 504-7.

188 See *W v W* (1994) FLC 92-475.

189 See *Re Dawson (deceased); Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWLR 211, 215-6 ('*Re Dawson*'); *Pilmer* (2001) ALJR 1067, 1084-5; *Maguire v Makaronis* (1997) 188 CLR 449, 467-75.

Court has clearly stated that contributory fault principles will be irrelevant in cases of fiduciary breach.[190] Importantly, it should be noted that equitable remedies, while independent of common law limitations, are subject to equitable limitations arising from their discretionary nature.[191] Further, in cases of exploitation, particularly child sexual abuse, these concepts will be largely irrelevant. However, issues of contributory fault may arise in the doctor-patient relationship.[192] Consider a patient who continues to take a negligently prescribed drug, which he or she knows is causing harm, and does not seek further medical advice. Assuming such a patient is successful in establishing negligence by their doctor, under apportionment legislation, he or may have their award reduced because of contributory negligence.[193] However, if the patient could frame their claim in fiduciary law, for instance if the doctor failed to disclose a reward from the pharmaceutical company for each prescription, under the current Australian approach, the patient's conduct would not impact upon compensation.

Outside contributory fault, issues of causation, while relevant,[194] may also be dealt with differently in equity.[195] It has been suggested that the doctrine of novus actus interveniens does not apply.[196] However, cases which limit the need to address causation issues should be considered carefully in the context of their facts. The principles in *Re Dawson* and *Brickenden* may be well suited to cases involving compensation for misappropriation of trust property or failure to disclose interests respectively, but they may not translate well to the broader kinds of fiduciary breaches already accepted by the courts, and those advocated in this article.[197] Even the approach of McLachlin J in *Canson* does not require a fiduciary to bear loss essentially caused by third parties.[198] Given the complex factors that may affect a person's physical or mental interests, the need to establish clear lines of causation is even more pronounced in the context of breaches affecting non-economic interests. As Kirby J reiterated in *Pilmer*, '[t]he "cardinal principle of equity [is] that the remedy must be fashioned to fit the nature of the case and the particular facts."'[199]

190 *Pilmer* (2001) ALJR 1067, 1084-5; *Maguire v Makaronis* (1997) 188 CLR 449, 467-75. See also, Gummow, above n 179, 86.

191 See *Pilmer* (2001) ALJR 1067, 1098; *Maguire v Makaronis* (1997) 188 CLR 449, 493-4; *Canson* (1992) 85 DLR (4th) 129, 157-63 (McLachlin J).

192 See generally Robert Harper, 'The Application of Contributory Negligence Principles to the Doctor/Patient Relationship' (2001) 9 *Torts Law Journal* 180.

193 See, eg, *Wrongs Act 1958* (Vic) s 26(1). Note: Victoria, Tasmania, NSW and the ACT have amended their apportionment legislation to include claims for breaches of duties of care imposed by contract. In other jurisdictions, *Astley v Austrust Ltd* (1999) 197 CLR 1 continues to prevent application of contributory negligence where the claim is framed in contract: see ibid 199-200.

194 *Maguire v Makaronis* (1997) 188 CLR 449, 468, 488-496; *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 556-8. Contra *Re Dawson* [1966] 2 NSWLR 211, 215-6. See Mason, above n 33, 244; Michael Tilbury, 'Equitable Compensation' in Patrick Parkinson (ed), *The Principles of Equity* (1996), 796; J D Heydon, 'Causal Relationships Between a Fiduciary's Default and the Principal's Loss' (1994) 110 *Law Quarterley Review* 328.

195 See *Maguire v Makaronis* (1997) 188 CLR 449; *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (*'Brickenden'*).

196 *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 426; *Maguire v Makaronis* (1997) 188 CLR 449, 470.

197 See Heydon, above n 194, 332.

198 (1992) 85 DLR (4th) 129, 160-4.

199 (2001) ALJR 1067, 1098, citing *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 559, itself citing *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723, 728-9.

It is argued that while recovery under concurrent claims under the common law and in equity may be similar in most cases, the courts should not relinquish equity's remedial flexibility in cases where a breach of fiduciary duty can be established. Importantly, the deterrent function of fiduciary law should be recognised. In some cases, such as child sexual abuse, this function may be best served by an award of compensation reflecting exemplary or aggravated damages.[200] In other cases, such as a harmful diagnosis by a self-interested doctor, the relaxation of principles of foreseeability, remoteness, and mitigation may better achieve this aim.[201] Fundamentally, though, the benefit of applying fiduciary law may not be found in a larger award of compensation, but in the appropriate acknowledgment in law of the wrong done to the plaintiff.[202]

V CONCLUSION

Fiduciary law presents particular challenges for courts faced with novel claims. The need to balance flexibility with coherence, particularly in the context of overlapping obligations, makes line-drawing difficult. For Australian courts, the distinction between economic and non-economic interests has provided a convenient label upon which a boundary has been drawn. However, the distinction is arbitrary, and pays insufficient regard to the central concept of fiduciary obligations: the wrongful pursuit of self-interest or rival interests.

Crucial to the inclusion of non-economic interests within the ambit of fiduciary law is an understanding of the nature and function of fiduciary relationships. It is often thought that to seek a definitive principle on which fiduciary law is based would unnecessarily restrict a useful and flexible tool of equity.[203] However, without guiding principles the law struggles to deal adequately with novel claims and changing social expectations. Indeed, its flexibility may be impeded. Courts must consider not just 'whether' a relationship is fiduciary, but 'why' a relationship is fiduciary. It is by failing to engage with this question that courts create and sustain arbitrary distinctions. This is exemplified by the Australian experience with the guardian-ward relationship. Even within seemingly 'established' fiduciary relationships, novel questions of scope inevitably arise. These questions cannot be adequately addressed if the courts' analysis of the relationship in question proceeds solely on the basis of labels or the applicability of fiduciary

200 *M(K) v M(H)* (1992) 96 DLR (4th) 289, 336-7. Note, despite the willingness of Canadian courts to award punitive damages for breach of fiduciary duty, this remains a controversial proposition: see John McCamus, 'Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada' (1997) 28 *Canadian Business Law Journal* 107, 114.

201 However there are circumstances in which aggravated damages may be awarded against doctors: see Christine McCarthy, 'Exemplary and Aggravated Damages in Medical Negligence Litigation' (1998) 6 *Journal of Law and Medicine* 187.

202 See Des Rosiers, 'Childhood Sexual Abuse' above n 12, 203. See generally, Bruce Feldthusen, 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' (1993) 25 *Ottawa Law Review* 203; Marfording, above n 9, 225-6.

203 See, eg, *Hospital Products* (1984) 156 CLR 41, 69 (Gibbs CJ). Cf Paul Finn 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales Law Journal* 76, 85.

language. Ultimately, fiduciary obligations are imposed where a high standard of loyalty is required to ensure the 'integrity, credibility and utility' of certain relationships. Thus fiduciary obligations must cover all interests whose exploitation undermines this triumvirate, whether or not they be economic in nature.

The use of the distinction in recent Australian decisions rests upon a misapplication of *Breen v Williams* and a simplistic characterisation of the Canadian approach. On one side lies the labels 'economic', 'proscriptive' and 'Australian'; on the other, 'non-economic', 'prescriptive' and 'Canadian.' These distinctions cannot be sustained. Contrary to the recent Australian approach, *Breen v Williams* did not reject the possibility that non-economic interests could be the subject of fiduciary law. Rather, the question was left open. What *Breen v Williams* did reject, was the notion that fiduciary law could impose positive obligations. However, as a close examination of cases such as *Norberg v Wynrib* and *M(K) v M(H)* reveals, the protection of non-economic interests can occur within the proscriptive model of fiduciary obligations. This is further highlighted by the approach of recent Canadian decisions.

Of most significance, is the question of whether fiduciary law adds something to existing doctrines of contract and tort law where non-economic interests are concerned. The answer to this question must extend beyond procedural and remedial differences. Limitation statutes are not written in stone. Further, while it is argued that equity should retain its remedial flexibility in all cases of breaches of fiduciary duty, the question of remedies is secondary to the question of whether, in principle, fiduciary obligations should extend to cover non-economic interests. It is argued that classifying sexual and physical exploitation perpetrated by doctors on their patients, or parents or guardians on children in their care, as breaches of fiduciary duty best comprehends the nature of the wrong. It is qualitatively different from physical or sexual assault perpetrated by a stranger. Finally, once a fiduciary relationship is established, the line between conduct which is tortious or in breach of contract and that which constitutes a breach of fiduciary duty ought not be determined by the arbitrary measure of whether or not the interest affected is economic. Rather, courts should focus on whether the conduct constitutes a wrongful pursuit of self-interest or rival interests. In this way, courts can deal with fiduciary law's interrelationship with contract and tort in a conceptually satisfying manner that is consistent with the nature and function of fiduciary law.