CRYPTO-FIDUCIARY DUTIES

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I INTRODUCTION

At least since the crystallisation[1] of the doctrines of equity which began during the Chancellorship of Lord Nottingham (1673–82), the chief characteristic of our general civil law has lain in the doctrinal integrity of equity, and its distinction from – and dependence upon – the common law.

Frederic Maitland observed that the distinct contours of law and equity we recognise today are the work 'of men who were steeped in the common law'.[2] This is not to say that from their earliest days the two bodies of jurisprudence were really ever a confluent stream; rather, it is a recognition that equity was not a rival or alternative to the common law, but a different, independent system co-existing (almost symbiotically) with it. Again, to quote Maitland, 'we ought to think of equity as supplementary law, a sort of appendix added on to our code, or a sort of gloss written round our code, an appendix, a gloss'.[3] It will be apparent that equity cannot exist without law, yet *must* exist independently of it.

An interesting historical example of equity's capacity for intervention in the common law (in this instance the law of tort) may be seen in *Sir Henry Sherrington's Case*.[4] In that case, Sir Henry Sherrington had cut down certain oaks and other trees growing upon lands belonging to Queen Elizabeth I. Some time after Sir Henry's death, the Attorney-General exhibited an information against his widow and executrix. Plowden, counsel for Sir Henry's widow, averred that the action, '*mes in nature de trespass al Common ley*',[5] could not lie against Lady Sherrington, and invoked the immemorial maxim *actio personalis moritur cum persona*.[6] Chief Baron Manwood favoured a middle course: that in such cases an offender's executors should be chargeable only to the extent that

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1 The expression is Maitland's: see Frederic W Maitland, *Selected Historical Essays* (1957) 115.
2 Ibid.
3 Frederic W Maitland, *Equity: A Course of Lectures* (2nd revised ed, 1949) 18.
4 (1582) Savile 40; 123 ER 1000, 1000. See also *Phillips v Homfray* [1883] 24 Ch D 439, 457, where it was considered by Bowen LJ.
5 '[I]n the form of trespass at common law.'
6 'A cause of action dies with the person.'

the offender had *benefited* from his tort: in this case, for the profit made from the trees that had been felled and sold; but they would not be chargeable for, say, trampling the herbage.[7] The report concludes that this course '*fuit agree pur bon ley*'.[8]

Professor Ibbetson points out that a similar result eventually obtained in France, in judgments of the Parlement de Paris, but that the equitable modification in England of the ancient maxim of the *ius commune* preceded a similar development in the French and other Continental jurisprudence by at least twenty years.[9] This attests to the ability of the nascent equitable doctrines to act as a corrective or supplement to the general law.

The jurisprudents have constantly turned their minds to this co-existence of law and equity: Sir Henry Maine thought that equity *qua* law was, or might soon become, a spent force, ready to be succeeded by some other (innominate) instrumentality;[10] Sir William Holdsworth thought that at one time the continued supremacy of the common law was imperilled by the expansion of equity.[11] More recently, Lord Oliver of Aylmerton has opined that

> [a]rguably [equity] is in the process not merely of supplementing the common law but of supplanting it with doctrine that renders obsolete the traditional concept of the creation of contractual rights.[12]

Fundamental to all these prognoses is an acknowledgment at least of the fact of law and equity's 'separate co-existence'. It is one thing to say, as Lord Redesdale is said to have, that yesterday's equity is tomorrow's law:

> A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.[13]

That is a pellucid observation of equity's 'supplementary' function, but is otherwise a fact that hardly needs acclaiming or bewailing.

It is quite another thing to declare that today's law will be tomorrow's equity. And that, it will be noted, Lord Redesdale did not say. That is an entirely different proposition, and one that sits quite uncomfortably with equity's corrective and supplemental function. In order for equity to perform its function, there must remain alive some meaningful distinction between equitable and legal doctrine, between equitable and legal remedies.

Yet there has of late been a tendency to mingle remedies traditionally within the purview of equitable causes of action with remedies available only at

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7 'Mes quant l'action ou Informacion est pur defouler des herbs, &c *ad damnum*, l'executor ne serra charge' (1582) Savile 40; 123 ER 1000, 1000; 'where the cause of action is for trampling the herbage etc, the executor would not be held liable.'

8 Ibid; 'was held to be good law.'

9 David Ibbetson, *Common Law and Ius Commune* (2001) 13–14.

10 Sir Henry Maine, *Ancient Law* (1954) 41.

11 Sir William Holdsworth, 'The Reception of Roman Law in the Sixteenth Century (III)' (1912) 28 *Law Quarterly Review* 131.

12 Lord Oliver of Aylmerton, 'Requiem for the Common Law' (1993) 67 *Australian Law Journal* 675, 676.

13 See *Spect v Spect* (1891) 26 P 203, 205 (Harrison J); *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516, 554 (Gummow J).

common law. This article, while doing no more than to trace the outline of that tendency, will point to a few examples of this admixture.

Nowhere is this morganatic marriage of legal and equitable principles more evident than in the field of fiduciary duties – where, to apply the description used in *Meagher, Gummow and Lehane*, there is to be seen an 'elision of fiduciary and other duties'.[14] In other words, an amalgamation of the duties recognised by equity as those properly appertaining to the relationship of a fiduciary with his or her principal, and 'other' duties whose breach would not attract the operation of equitable remedies, *because they are not the subject of a relationship supervised by equity.* Their origins are legal, and legal remedies must attach to their breach.

II FIDUCIARY DUTIES AND COMMON LAW DUTIES

In this area, the first problem arises in the conceptual elision of fiduciary and non-fiduciary duties, and the second problem in fundamentally loose applications of the haphazardly developed taxonomy used to describe these duties.

Considering first the different nature of fiduciary and non-fiduciary duties, it is possible to enunciate some of their salient characteristics.

Fiduciary duties. These typically arise from relationships of trust and confidence, or from the entry of the parties into confidential relations. In the archetypal fiduciary relationship, the fiduciary undertakes to act for, or on behalf, or in the interests of, another person (eg a trustee and *cestui que trust*) in the exercise of some power or discretion capable of affecting the interests of that other person 'in a legal or practical sense'.[15] It hardly needs remarking that the other party is vulnerable to the fiduciary's abuse of his or her position. It has rightly been observed,[16] however, that exposure to abuse of position is not necessarily the lynchpin of the fiduciary obligation. While it remains an essential characteristic of the fiduciary relationship, the cardinal aspect of the fiduciary relationship is the one described above, *viz*, the very fact of the undertaking given by the fiduciary to act in, and promote, the interests of the principal. Vulnerability to abuse of a position of trust and confidence is the inevitable corollary of an abuse of the fiduciary's undertaking to act in the interests of the principal.

Non-fiduciary duties. In his speech in *Nocton v Lord Ashburton*,[17] Lord Dunedin observed that 'whenever we come to the idea of breach of duty we see how nearly the domains of law and equity approach, or perhaps, more strictly speaking, overlap'.[18] Non-fiduciary duties might be embraced by his Lordship's utterance, because they are the (generally tortious) duties with the protean quality that confuse the distinction between equitable and legal duties. But on their

14 Justice R P Meagher, Justice J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) 210 ff.

15 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J).

16 *C-Shirt Pty Ltd v Barnett Marketing and Management Pty Ltd* (1996) 37 IPR 315, 336 (Lehane J).

17 [1914] AC 932.

18 Ibid 964.

proper construction, they are, of course, legal duties, and must attract *legal* remedies.

An example of this sort of non-fiduciary duty is the one given by Lord Dunedin himself, *viz*, the solicitor's duty to act carefully.[19] Another important example is the company director. A director may owe duties of varying character; fiduciary duties necessarily prominent amongst those. But surely a director's bare duty to exercise care and skill in the despatch of the company's business must be a duty owed, and framed, in tort? Nevertheless, these duties, by dint of careless factual analysis, are apt to be inflated into something that they are not: crypto-fiduciary duties.

III THE ELISION, OR SUPERIMPOSITION OF DUTIES

It is often overlooked that a fiduciary agent typically might owe the principal a number of duties, and that these several duties may be characterised in different ways.[20] First, there are fiduciary duties *stricto sensu* (insofar as they are capable of adequate definition).[21] Second, there are less-distinct duties not strictly 'fiduciary' in character, but perhaps 'equitable' duties nonetheless in that the circumstances triggering their breach *might* result in an *incidental* breach of a fiduciary duty. Third, the fiduciary's relationship might generate duties that are not 'fiduciary' in character whatsoever – duties owed, say, in tort.

Quite obviously, what emerges from this is that not every breach of duty by a fiduciary will be a breach of a fiduciary duty, or even a merely equitable duty; that a person should occupy a position of fiduciary responsibility is not enough, of itself, to infuse all that person's actions with a 'fiduciary' flavour. Accordingly, the material facts said to give rise to a fiduciary relationship must be carefully examined, so that the quality and extent of the duties might properly be understood.

Viewed from this, its simplest point, the 'elision' of fiduciary and non-fiduciary duties mentioned earlier is often the result of the inaccurate *characterisation* of duties. And much inaccurate characterisation is made wilder by the imprecise taxonomy used to describe the various duties (a matter which will be touched upon later). Hence the fundamental imperative of careful analysis.

In *Henderson v Merrett Syndicates Ltd*,[22] Lord Browne-Wilkinson offered an analysis of the several duties that we have attempted to disentangle. On our analysis, it might respectfully be said that his Lordship seems to have made the knot tighter:

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19 Ibid.

20 Meagher, Heydon and Leeming, above n 14, 210.

21 See *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 7 (Gibbs CJ).

22 [1995] 2 AC 145, 205. See also the analysis offered in Meagher, Heydon and Leeming, above n 14, 211 ff.

> [I]n truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, *not from their status or description*.[23]

Here, his Lordship seems to say that all duties have the same content (or that fiduciary or non-fiduciary, they are analogous) and eschews the approach contended for above, *viz*, that not all aspects of a fiduciary's conduct generate specifically *fiduciary* responsibilities. This is confusing enough; a little further on, his Lordship implies that most (if not all) duties owed by a fiduciary are fiduciary in character; or, to put it another way, that because the duties 'are all the same', all duties arising out of the assumption of responsibility for another's property or affairs have a fiduciary character:

> [I]t is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold.[24]

It is not necessary to speculate as to which of the nuances postulated here was favoured by Lord Browne-Wilkinson in his judgment; it suffices simply to say that the approach in *Henderson v Merrett Syndicates Ltd* is illustrative of the tendency to *elide* fiduciary and non-fiduciary duties. Lord Browne-Wilkinson numbered directors in his list. But surely the duty of a company director to act with reasonable skill in the despatch of the company's business is a tortious one, for which the law of negligence has elaborated principles by which loss is to be compensated?

It seems that Lord Browne-Wilkinson's analysis is heterodox in one particular sense: his Lordship has omitted to explain why it is necessary, say, for a firm of carriers (to take but one example from his list) to have their business relationship with their client impressed with a *fiduciary* character – when the ordinary tortious duties of care seem more than adequate to regulate the relationship, and to compensate for any breach of duty.[25] How can this analysis be reconciled with the clear reservation, expressed in *Hospital Products v United States Surgical Corporation* ('*Hospital Products*'), that in the ordinary course of events, purely commercial arrangements on an equal footing do not give rise to a fiduciary relationship?[26] This is the question that the proponents of 'elision' (perhaps the new 'fusion') never seem equal to answering.

The answer to the question turns upon the necessity for equitable intervention in a given case. Of course, as far as bailment is concerned, upon the establishment or satisfaction of certain conditions there may arise a fiduciary relationship between bailor and bailee – if, for example, the bailee holds or deals with the goods for the benefit of the bailor, or for certain limited purposes specified by the bailor. Equity will give a remedy here: an abuse of the terms of those limited purposes or dealings will render the fiduciary liable to account for his or her breach of the arrangement.

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23 Ibid (emphasis added).

24 Ibid.

25 *South Australian Insurance Co v Randell* (1869) LR 3 PC 101, 113 (Sir Joseph Napier).

26 (1984) 156 CLR 41, 70 (Gibbs CJ), 118 (Wilson J) and 149 (Dawson J).

This was settled by Sir George Jessel MR in *Re Hallett's Estate*,[27] and by Mason J in his *obiter dicta* in *Hospital Products*.[28] There, the existence of a fiduciary relationship was postulated when, by the addition of special terms, a bailment is converted into a trust arrangement.

All this illustrates the limits of any rationalisation of equitable and common-law duties. Instead of pointing towards a presumption in favour of the existence of a fiduciary relationship, the necessity of special conditions constituting a bailment as a trust arrangement quite logically favour the opposite presumption: that, absent these *indicia*, there will not be a fiduciary relationship, and that the principles of contract or tort will supply a remedy. In the words of Gibbs CJ: '[T]he fact that there is a duty to be performed – *a job to do* – cannot in every case create a fiduciary obligation.'[29]

It is true, as Lord Dunedin pointed out in *Nocton v Lord Ashburton*, that duties owed at law and duties owed in equity might approach closely, or even overlap. However, when one has regard to the particular interests that fiduciary duties traditionally have protected – control over the property, the interests, the confidences, even, perhaps, the person,[30] of another – one realises that these are different interests to those secured by the law of tort or contract. Invariably (though not exclusively), they are economic interests peculiar to the fiduciary relationship[31] (which are somewhat different, say, to general tortious duties that one might owe the world at large, whether one is a fiduciary or not, and which arise *without* the ambit of a fiduciary relationship).

Careful analysis of each relationship is called for. It is not enough to say that if a breach of a duty can be framed in terms of an abuse of a position of responsibility, influence, trust or confidence, that breach is inevitably a breach of a fiduciary duty. So, in *News Ltd v Australian Rugby Football League Ltd*[32], the full bench of the Federal Court reversed a decision[33] of Justice Burchett's which had sought to fix certain renegade rugby league clubs (erstwhile members of the League) with breaches of fiduciary duty – deriving, apparently, from the 'interdependence' of the clubs within the League, the 'mutuality of the enterprise'[34] and other factors which led Burchett J to conclude that the arrangements had something of the flavour of a joint venture or partnership.

The importance of the substantive analysis is shown in the Full Court's rejection of Justice Burchett's joint venture or partnership analogy – on which footing he raised his fiduciary edifice. The Full Court, noting that the substance[35] of each (putatively fiduciary) relationship demands scrutiny, held that there was no relationship of trust and confidence or 'mutuality' as between the constituent

27 (1880) 13 Ch D 696, 709.
28 *Hospital Products* (1984) 156 CLR 41, 101.
29 Ibid 71 (emphasis added).
30 See *Breen v Williams* (1994) 35 NSWLR 522, 570.
31 See *Parasivamam v Flynn* (1998) 160 ALR 203, 218 (Miles, Lehane and Weinberg JJ).
32 (1996) 64 FCR 410 (Lockhart, von Doussa and Sackville JJ).
33 *News Ltd v Australian Rugby Football League Ltd* (1995) 58 FCR 447.
34 Ibid 544.
35 (1996) 64 FCR 410, 538–9.

clubs and the League of which they were members, and accordingly, that the arrangements between them were not fiduciary in character.[36]

IV IMPRECISE TAXONOMY AND THE SUPERIMPOSITION OF DUTIES

The difficulties that attend the analysis and characterisation of the various duties are not allayed by the imprecision of the taxonomy that has been developed to explain fiduciary duties. It need not be said that the list of persons owing fiduciary duties is not closed, nor that the boundaries of those duties have been fixed[37] (which is different to swelling them by importing new ones from the law of tort!). However, it must be said that the openness of the categories of fiduciaries and fiduciary duties on one hand, and the imprecision of the nomenclature on the other has perhaps encouraged the tendency of many courts to assign the fiduciary 'labels' to duties or relationships to which they should not attach. In *Parasivamam v Flynn* ('*Parasivamam*'), a full bench of the Federal Court noted that

> the apparent applicability of the descriptions [ie to non-fiduciary relationships] illustrates … not only the incompleteness but also the imperfection of the various formulae which have at various times been suggested as encapsulating fiduciary relationship or duty.[38]

In this way, the 'formulae' should not be used conveniently or superficially to label an indefinite duty as 'fiduciary', but should be applied at the conclusion of a process of reasoning that acknowledges the particular circumstances in which courts of equity created, and have applied, those formulae. So, concluded the Court in *Parasimavam*:

> [T]he principles can be understood only in the context of the way in which the courts have applied them. In that context, the success of the appellant's fiduciary claims, in this case, would indeed be a novelty.[39]

In that case, the Court was concerned with the appellant's claim for damages for assault and breach of 'fiduciary duty'. The respondent was, at all relevant times, the appellant's guardian. The latter alleged that he had been sexually abused at the hands of the respondent, and that this abuse was tantamount to a breach of fiduciary duty. Accordingly, it might be seen as an Australian counterpart to the Canadian decision of *M(K) v M(H)*.[40]

After acknowledging that a fundamental aspect of parental obligation is to avoid inflicting injuries on one's child – and noting that it is a right appropriately

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36 Ibid 542–51.

37 *Breen v Williams* (1994) 35 NSWLR 522, 570.

38 (1998) 160 ALR 203, 219 (Miles, Lehane and Weinberg JJ).

39 Ibid.

40 (1992) 96 DLR (4th) 289, where it was held that the relationship of parent and child was fiduciary; the duty being a duty of the parent(s) to protect a child's well-being and health.

protected by law – the Court concluded that it did not follow that the 'breaches of duty' complained of were necessarily fiduciary in character.[41]

Two considerations might be advanced in support of this view. First (to use the language of the Court), the behaviour complained of was 'within the purview of tort'.[42] As noted earlier, the law of negligence has developed its own principles by which loss or damage is assessed and compensated for. Is there, accordingly, any need for equitable intervention?

The Court was of the opinion that there was no remedial advantage to be gained from equity's intervention.[43] This is the second consideration in support of the Court's conclusion in *Parasivamam*. It is neatly summarised in the Canadian decision of *Norberg v Wynrib*, where Sopinka J said:

> Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy.[44]

Chief Justice McEachern made a similar point in *Norberg v Wynrib*, at the intermediate stage, in the Court of Appeal of British Columbia:

> [U]nless the breach relates to an improper disclosure of confidential information or something like that, it adds nothing to describe the breach as a fiduciary one.[45]

Justice Sopinka's statement was approved by the High Court of Australia in *Breen v Williams*.[46]

The facts in *Parasivamam* are another instance of the elision of duties: in that case, of the superimposition of equitable duties onto common law ones. If equity is to retain its doctrinal integrity (and if that integrity is to have any useful function) the intervention of equity must be reserved to cases where it was traditionally thought necessary: where the common law provides no adequate remedy.

V SUPERIMPOSITION OF REMEDIES

Impatient application of the taxonomy and the wayward elision of distinct duties and causes of action have had the effect of importing into equity a number of common law remedies. Since *Day v Mead*[47] this has become a feature of everyday life in New Zealand, and indeed has probably resulted in the evaporation of many distinct principles of equity in that country.

The tendency seems to have become *de rigueur* in England, and is a vogue that should be resisted in Australia – as it now seems to have been (though with

41 *Parasivamam* (1998) 160 ALR 203, 220 (Miles, Lehane and Weinberg JJ).
42 Ibid 219.
43 Ibid 220.
44 (1992) 93 DLR (4th) 449, 481.
45 (1990) 44 BCLR (2d) 47, 52.
46 (1996) 186 CLR 71, 110 (Gaudron and McHugh JJ).
47 [1987] 2 NZLR 443.

some equivocation): *Harris v Digital Pulse Pty Ltd*.[48] The arguments advanced by the proponents of this tendency are not dissimilar to those proposed by Lord Browne-Wilkinson in his rationalisation of fiduciary and non-fiduciary duties, and are doctrinally as nebulous. In *Douglas v Hello! Ltd*[49] (a very recent example of such English jurisprudence) Lindsay J simply 'assumed' that 'exemplary damages (or equity's equivalent) are available in respect of breach of confidence'.[50] But what, it should be asked, is equity's 'equivalent'? What can be the equivalent of a remedy it has never known? Witness the reasoning advanced in support of this proposition; the looseness of the entire methodology will be apparent:

> [T]he question whether or not to award exemplary damages should be determined more by reference to the nature of behaviour complained of than by reference to the nature of [sic] cause of action to which that behaviour has given rise.[51]

Presumably in support of the course taken, some *dicta* of Lord Devlin's in *Rookes v Barnard*[52] are then cited (explaining the circumstances in which an award of exemplary damages might be indulged in). But *Rookes v Barnard* was a common law case concerning intimidatory conduct used to threaten a breach of contract; doubtless that was a consideration immaterial to Lindsay J, as seems also to have been Lord Devlin's caveat that exemplary damages are awarded in respect of punishable behaviour only.[53]

It is not necessary here to rehearse the immemorial arguments that 'equity and penalty are strangers'[54] – a proposition beyond doubt; confirmed, needless to add, by our own High Court,[55] and again recently visited by the Court of Appeal of New South Wales.[56] It is a proposition whose historical and technical exegesis really requires a separate consideration; we mention it only to reinforce what has been the point of this article: that the rigour with which causes of action and remedies are framed must do justice to the spirit of what was once seen fit to be described as the *rigor aequitatis*.[57]

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48 (2003) 56 NSWLR 298. See also the remarks of Charles E F Rickett, 'Punitive Damages: The Pulse of Equity' (2003) 77 *Australian Law Journal* 496, 499, who is less than sanguine about the future integrity of the traditional attitude to the award of damages in equity.

49 *Douglas & Ors v Hello! Ltd & Ors* [2003] 3 All ER 996.

50 Ibid 1073.

51 Ibid.

52 [1964] AC 1129, 1226.

53 Ibid 1227.

54 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 302 (Somers J).

55 See *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483, 498 ff, where Windeyer J discusses the short, irregular life of the penalty in the Chancery – which seems to have been more in the nature of an administrative sanction to procure compliance with decrees of Chancery than as an instrument of substantive relief.

56 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, although the Court does not appear to have considered *Australian Consolidated Press Ltd v Morgan* in its treatment of the historical authorities.

57 Sir Carleton K Allen, *Law in the Making* (5th ed, 1948) 390.