What are the advantages of pleading a claim for compensation for a trustee's breach of a "fiduciary" duty of care, diligence and skill?

by

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1. Ladies and gentleman, the point of this short presentation is to assist the choice of whether to plead a claim for compensation for breach of "fiduciary" obligation against a trustee or person in a like fiduciary relationship.

2. I have chosen the example of a claim against a trustee to discuss the topic, for two reasons. First, because the relationship of trustee and beneficiary or, as it used to be called in law French, *cestuis que trust*, is the source of "fiduciary" duties or obligations. By analogy, equity has extended fiduciary obligations to many other relationships. The classes of relationships that might attract them are not closed. But the best starting point, for analytical purposes, is the classical trustee and beneficiary relationship. Second, in some of the other relationships, the complicating factors start to multiply pretty quickly. I haven't the energy and you haven't the time for me to try to capture the complicating factors in a presentation like this.

3. As a disclaimer, may I say what I am not trying to do. Those of you familiar with the writings of both Judges and the Academy in this area know that there is a torrent of cases and articles of relevance[1] and the subject area is touched on or covered in many text books too.[2] I do not aspire to add my tuppence worth to what is a wide-ranging debate. But to my mind, for the purposes of practical decision making, the discussion needs to be distilled, at least for any of us trying to plead or to analyse a pleading for a relevant claim.

4. There are some background things to keep in mind. The first is that the modern forms of trust that produce claims in our Australian context bear little resemblance to those of the cases in which most of the principles and remedial law as to breach of fiduciary duties evolved. The historical context was the law of settlements by land owners and testators of wealth who were minded to provide for family members and at the same time to control and protect the disposition and use of their bounty.

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1 A selected range of the articles is Davidson, "The Equitable Remedy of Compensation", (1981-2) 13 MULR 349; Gummow, "Compensation for Breach of Fiduciary Duty", in Youdan, *Equity, Fiduciaries and Trusts,* 57; Heydon, "Causal Relationships between a Fiduciary's Default and the Principal's Loss", (1994) 110 LQR 328; Conaglen, "Equitable Compensation for Breach of Fiduciary Dealing Rules", (2003) 119 LQR 246; Elliott and Edelman, "Money Remedies against Trustees", (2004) 18 TLI 116; Smith, "The Measurement of Compensation Claims against Trustees and Fiduciaries", in Bant and Harding, *Exploring Private Law,* 372; Heydon, "Are the Duties of Company Directors to Exercise Skill and Care Fiduciary?", in Degeling and Edelman, *Equity and Commercial Law,* 208; and Mitchell, "Equitable Compensation for Breach of Fiduciary Duty" [2013] CLP 307.

2 See, for Australia in particular, Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, (2016, 8th ed, LexisNexis Butterworths) [17-18]; and Heydon, Leeming and Turner, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, (2015, 5th ed, LexisNexis Butterworths).

5. The paradigm was of an instrument of settlement under which more than one trustee jointly acted without reward for the benefit of the cestuis que trust. The trustees' obligations were relatively onerous and breach of duty visited with strict liability. The powers of investment were limited. The risks of liability that attached to breach of trust were considerable. So much so that statutory relaxations and protections were introduced to encourage people to continue to take on the office of trustee.

6. The idea of the commercial trust company did not inform the development of that law. Nor was it shaped around what has now become the ubiquitous trading trust, whether discretionary or unit trust, by which so much small to medium sized business is conducted in this country, let alone the development of trust structures for the organisation of self-managed superannuation funds. These commercially driven structures bear limited comparison to the circumstances that informed the development of most of the law of fiduciary obligations. Even so, those obligations are applied to them.[3]

7. Let me begin with my straightforward example. T is the trustee of a family unit trust that has significant assets and carries on business as a plumber. The beneficiaries include three generations of T's family. Some of them have no active interest in the business. Others, including T,[4] are involved in its management and are employed by it. T enters into a contract to carry out plumbing work on a large project that is a high-risk contract. When the project turns into a disaster, the business makes a large loss on the contract. Some of the family members who are beneficiaries want to sue T to recover the losses because the decision he made to enter into the contract was imprudent. Can they? What are the causes of action?

8. Section 22 of the *Trusts Act* 1973 (Qld) ("TA") provides:

> "(1) A trustee must, in exercising a power of investment—
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> (a) if the trustee's profession, business or employment is, or includes, acting as a trustee or investing money for other persons—exercise the **care, diligence and skill a prudent person** *engaged in that profession, business or employment* **would exercise** in managing the affairs of other persons; or
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> (b) if the trustee's profession, business or employment is not, or does not include, acting as a trustee or investing money for other persons—exercise the **care, diligence and skill a prudent person** *of business* **would exercise** in managing the affairs of other persons." (emphases added)

9. Does paragraph s 22 apply to T entering into the plumbing subcontract as an exercise of a power of investment?[5] Does T's employment constitute the business of acting as a trustee under paragraph (a)? What does paragraph (b) do if it applies?

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3 Note that in Queensland the statutory powers of investment under the *Trusts Act* 1973 (Qld) do not include a general power to carry on a trading business. Any such power must be found in or implied from the trust instrument.

4 Assume that either the trust instrument or s 101(2) of the *Trusts Act* 1973 (Qld) authorises it or an order for remuneration is made under s 101(1).

5 See, for example, *Gardner v Mattila* [2015] NTCA 1, [34].

10. There is a reason to mention s 22. It reflects a statutory choice as between different formulations of standards of care applicable to a trustee in the administration of a trust, in exercising a power of investment, as set down in late nineteenth century.[6] In particular, if paragraph (a) or paragraph (b) applies, in Queensland the standard is measured by reference to what a prudent person managing the affairs of another person would do, not what the prudent person would do in managing their own affairs, unless s 22 is excluded by the trust instrument.[7]

11. A breach of these obligations would be treated as a breach of trust. Uncontroversial examples of that treatment abound.[8]

12. What about s 76 of the TA? It provides:

> "**If it appears** to the court **that a trustee**, whether appointed by the court or otherwise, is, or **may be, personally liable** for any **breach of trust**, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, **but has acted honestly and reasonably**, and **ought fairly to be excused for the breach of trust** and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then **the court may relieve the trustee** either wholly or partly from personal liability for that breach." (emphasis added)

13. Does the power to relieve a trustee under that section apply to T's breach of the obligation to exercise care, diligence and skill? Theoretically, it might. But practically speaking, the courts are unlikely to find that a trustee who failed to exercise the skill of a prudent person should be excused as someone who acted reasonably. The scope of s 76 is intended to relieve an innocent person from a strict liability, not a negligent breach of trust.

14. Next, s 72 of the TA provides:

> "A trustee may **reimburse himself** or herself for **or pay or discharge** out of the trust property **all expenses reasonably incurred** in or about the execution of the trusts or powers."

15. Can the disappointed beneficiaries avoid the need to bring a claim for equitable compensation by applying instead to stop T from having recourse to the trust assets to meet the liabilities he incurred in carrying out the loss-making transaction, assuming that they can get in quickly enough? Could the answer be "yes" as against T, as liabilities not properly incurred, but "no" against the creditors of T, if they are unpaid, as persons subrogated to T's right of indemnity for trust liabilities? Probably not, on the principle that the right of subrogation of the creditor cannot rise above the trustee's right of

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6 Compare *In re Speight; Speight v Gaunt* (1883) 22 Ch D 727, 739, 756 and 762 and *Breen v Williams* (1996) 186 CLR 71, 137 (management powers, including managing a trust business) and *Learoyd v Whiteley* (1886) 33 Ch D 347, 355 (investment powers).

7 *ASIC v Drake & ors (No 2)* (2016) 118 ACSR 189, 255 [327].

8 Examples are *Re Whiteley; Whitely v Learoyd* (1886) 33 Ch D 347; *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426; *Re Lucking's Will Trusts* [1968] 1 WLR 866; and *Bartlett v Barclay's Bank Trust Co Ltd (No 1)* [1980] Ch 515.

indemnity or lack of it. The inquiry can quickly disappear down another equity rabbit-hole, now called the "clear accounts rule".[9]

16. Alternatively, can the beneficiaries obtain an order for the taking of the accounts of the trust including that T account for the loss-making contract on the footing of wilful default? The modern aversion to the remedy of an order for accounts of any kind, prompts the question: why would anyone go down that path? The answer is probably that no-one will. The days of the general administration suit in equity for a trust are long gone. But the reason to mention accounting on the footing of wilful default is that it was the pre-cursor to the modern remedy of equitable compensation and explains the absence of cases upon equitable compensation up to the late nineteenth century and because it informs the principles that operate when equitable compensation will be awarded.[10]

17. Getting back to the facts of the claim against T for equitable compensation for the loss-making contract, is it a claim for breach of a fiduciary obligation or a claim for an equitable duty of care akin to the tort of negligence, although brought for equitable compensation? Had you asked me that question 25 years ago I would have given an answer that recent cases suggest that there is not a lot of difference. But now?

> "In recent years it has been asserted that the trustee's duty to exercise reasonable care and skill, although it is an equitable duty owed by a fiduciary, is not a fiduciary duty. In this it is said to be like the duty of a company director. Most of the cases stating that the trustee's duty is not fiduciary have concerned solicitors, company directors, joint venturers, or other persons who were not trustees. Indeed, only one of the cases concerned a trustee and it, like the others, was decided on grounds other than the non-fiduciary nature of the trustee's duty. Although the issue could be important from the point of view of causation and remoteness tests, limitation and proprietary remedies, no case has turned on it. The cases have not explained why a trustee's duty is not fiduciary. They contain statements that equitable compensation for breach of the duty is to follow common law analogies which have been criticised by the High Court. There are other statements in the High Court which are hard to reconcile with them. The correctness of the proposition that trustees' duties to exercise reasonable care are not fiduciary has been cast in doubt because it has been relied on to justify the view that a settlor can exempt trustees from liability for gross negligence — a questionable conclusion. Although they have enjoyed wide acceptance by textbook and other writers, they have been tellingly criticised. There is also some authority against them."[11]

18. Those are the words of the authors of the current edition of *Jacob's Law of Trusts*, one of the leading text books on the law of trusts in Australia. You won't be surprised to hear me say that the views expressed in another, *Ford and Lee: The Law of Trusts*, aren't entirely consistent with that. Sometimes this question is treated as part of the prescriptive vs proscriptive fiduciary duty argument set alight in Australia by the joint judgment of

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9 Silink, "Trustee Exoneration from Trust Assets – Out on a Limb? The Tension between Creditor Expectations and the 'Clear Accounts' Rule" (2018) 12 J Eq 58.

10 The subject is dealt with in Heydon, Leeming and Turner, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, (2015, 5th ed, LexisNexis Butterworths) [23-090]-[23-115].

11 Heydon and Leeming, *Jacobs' Law of Trusts in Australia*, (2016, 8th ed, LexisNexis Butterworths) 356-357.

Gaudron and McHugh JJ in *Breen v Williams*.[12] Does it really matter? Or is it just an academic debate?

19. The answer I would give is that it does matter. To start with, there are two obvious points about potential defences that reduce liability.

Contributory negligence and proportionate liability

20. **First,** if the claim were brought in tort or in contract, for damages for breach of an obligation to exercise reasonable care, it would be subject to an apportionment of liability for contributory negligence under s 10 of the *Law Reform Act* 1995 (Qld).

21. What if we turn to equitable compensation for breach of a fiduciary duty? The High Court has not finally decided whether there can be contributory negligence reduction for a negligent breach of fiduciary duty, but it has gone pretty close.[13]

22. In *Pilmer v Duke Group Ltd (in liq)*[14] the majority said:

> "With respect to question (c), concerning "contributing fault", it is sufficient to say that the decision in *Astley v Austrust Ltd* indicates the severe conceptual difficulties in the path of acceptance of notions of contributory negligence as applicable to diminish awards of equitable compensation for breach of fiduciary duty. *Astley* affirms:
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> > At common law, contributory negligence consisted in the failure of a plaintiff to take reasonable care for the protection of his or her person or property. Proof of contributory negligence defeated the plaintiff's cause of action in negligence.
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> Contributory negligence focuses on the conduct of the plaintiff, fiduciary law upon the obligation by the defendant to act in the interests of the plaintiff. Moreover, any question of apportionment with respect to contributory negligence arises from legislation, not the common law. *Astley* indicates that the particular apportionment legislation of South Australia which was there in question did not touch contractual liability. The reasoning in *Astley* would suggest, a fortiori, that such legislation did not touch the fiduciary relationship."

23. Those points apply equally to s 10 of the *Law Reform Act* 1995 (Qld). Still, it is not going to be often that a beneficiary is contributorily negligent in a trustee's decision as to the business of the trust.

24. **Second**, if the liability is one for a "breach of duty of care" within the meaning of the *Civil Liability Act* 2003 (Qld) ("CLA"), then, under s 31, a claim for economic loss or damage to property in an action for damages arising from a breach of duty is an apportionable claim made subject to proportionate liability.

25. The scope of the proportionate liability defence under the CLA turns on whether a claim for breach of fiduciary duty, or a trustee's duty to exercise care, diligence and skill is an

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12 (1996) 186 CLR 71, 113.

13 Canadian and New Zealand cases have decided to the contrary.

14 (2001) 207 CLR 165, 202 [86]-[87].

apportionable claim within the meaning of ss 28 and 31. That turns on the meaning of the defined terms "duty" and "duty of care" in the expression "breach of duty of care" in the definition of "apportionable claim" s 28. Those terms are defined in the Dictionary to mean:

> "***duty*** means—
> (a) a duty of care in tort; or
> (b) a duty of care under contract that is concurrent and coextensive with a duty of care in tort; or
> (c) **another duty** under statute **or otherwise that is concurrent with a duty of care mentioned in paragraph (a) or (b)**.
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> ***duty of care*** means a duty to take reasonable care or to exercise reasonable skill (or both duties)." (emphasis added)

26. As far as I know, no-one has held yet that a breach of fiduciary duty, or a trustee's duty to exercise the care, diligence and skill of a prudent person, if that is a distinction to be made, comes within (c) of "duty" under the Queensland CLA. But at least one academic has argued for proportionate liability as a defence to a claim for compensation for breach of fiduciary duty.[15] And cases in other jurisdictions have countenanced such a defence under functionally equivalent provisions,[16] but the drafting of the Queensland CLA is different.

27. Taking our example, and our Queensland definition, because T is employed in the business, a question may arise whether he owes a duty of care in either contract or tort. Only if he does, will there be a concurrent duty to engage paragraph (c).

Causation

28. There is another difference between a claim for equitable compensation for breach of fiduciary duty and a claim for damages for negligence or breach of contract that matters.

29. The scope or role of causation is usually considered to be different in the case of a claim for equitable compensation for breach of fiduciary obligation from the case of a claim for damages for the tort of negligence. But, yet again, modern authority and academic writing has poured forth in a way that clouds the picture.

30. Let me start with the concepts of causation and remoteness as they apply in the law of tort for the tort of negligence. I looked at the point in a lecture I gave last year.[17] They have proved to be complex concepts and there is not time to explicate the common law's development now, but it is not necessary to do for my present purposes.

31. For damages for negligence causing economic loss, nowadays, the question of causation is asked in terms of s 11 of the CLA as follows:

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15 Vann, "Equity and Proportionate Liability" (2007) 1 J Eq 199.

16 *Walters (t/as Elringtons) v Kemp* [2014] ACTSC 100, [24]; *Polon v Dorian* (2014) 102 ACSR 1, 127 [901]-[902]; *George v Webb* [2011] NSWSC 1608, [325].

17 "Some Thoughts on Causation and Loss of a Valuable Commercial Opportunity", speech delivered 27 July 2017 at the Current Legal Issues Seminar Series 2017, Seminar 2, available at <https://archive.sclqld.org.au/judgepub/2017/jackson27072017.pdf>.

"(1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1) (a)—should be accepted as satisfying subsection (1) (a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) …

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

32. The High Court has accepted that the factual causation question under s 11(1) is a "but for" question and has more or less abandoned the hoary monster of causation, "common sense", as being relevant (subject to s 11(2)).[18] But I don't need to develop that discussion now.

33. It may be contentious whether the scope of liability question sometimes subsumes what was once dealt with by the concept of remoteness. Professor Jane Stapleton has tellingly criticised calling scope of liability part of causation at all.[19] But that is what the statute calls it and we are stuck with it.

34. What has any of this got to do with the concept of causation as it relates to loss for compensation for a trustee's (or other fiduciary office holder's) breach of fiduciary duty? The answer depends on what species of fiduciary duty is in view, but the overall likelihood is that the causal question in equity is less onerous for the plaintiff to answer than the questions in negligence.

35. But we are now in an area of the many-faced God, if you are a Game of Thrones watcher, where the cases speak with many voices.

36. The underlying cause of the state of discord is that in the 1980s and 1990s some courts and Judges made efforts to reduce the potential taxonomical differences between causation in one context and another. More recently, those efforts have been doubted, as I have already mentioned.

37. Most of the trouble started with three cases. One was the decision of Ipp J in *Permanent Building Society v Wheeler*.[20] Ipp J held that the equitable duty of a company director to exercise reasonable care and skill was not fiduciary in character and proceeded to apply the concept of causation that he distilled from some of the leading cases, as he saw it, to

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18 See for example *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 and *Wallace v Kam* (2013) 250 CLR 375, 383-386.

19 Stapleton, "Cause in Fact and the Scope of Liability for Consequences" (2003) 119 LQR 388.

20 (1994) 11 WAR 187.

the question whether loss or damage was suffered that entitled the plaintiff to compensation.[21] Ipp J placed the cases where no counterfactual causal inquiry is permitted, exemplified by *Brickenden v London Loan & Savings Co*,[22] as being of a different kind, thereby dividing the equitable duty of care and skill from other fiduciary duties on causation.

38. Second, a similar approach to causation for breach of fiduciary duty by a solicitor in failing to disclose information was proposed by La Forest J in the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co*.[23]

39. Third, in *Target Holdings Ltd v Redferns*,[24] Lord Browne-Wilkinson said:

> "At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put "in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation" . . . Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law… The detailed rules of equity as to causation may differ… But the principles underlying both systems are the same"

40. To make analysis as at the present day simpler, may I return to the model of a two-question taxonomy for causation in fact and scope of liability that is adopted under the CLA. It is useful to analyse the question of causation for breach of fiduciary duty in the same way, so as to break up the causation in fact part of the question from the normative or scope of liability part of the question.

41. Some commentators have persuasively argued that a two-question approach is already what the case law upon equitable compensation has been doing by requiring some degree of causation in fact and imposing added normative standards or requirements of the kind that fit within a scope of liability question,[25] but I don't need you to accept that conclusion to make my points.

42. The cases from *Canson* and *Target* on, and earlier cases as well, accept that a causation in fact component exists, but it is not clearly the same as the "but for" test that now holds the ground on the causation in fact question in negligence under the CLA. The suggestion is that there is a lower hurdle for equitable compensation. The language sometimes deployed to connote what is sufficient in equity is that the breach of fiduciary duty was "material" to the loss,[26] but that word may be criticised as masking the inquiry, rather than identifying it. In some cases, it is said to be the same as "but for" causation,[27] but not all cases.

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21 (1994) 11 WAR 187, 243-245.
22 (1934) 3 DLR 465, 469.
23 [1991] 3 SCR 534, 574-589.
24 [1996] 1 AC 421, 432.
25 O'Meara, "Causation, Remoteness and Equitable Causation" (2005) 26 Aust Bar Rev 51.
26 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, [9], [88]-[93] and [179]. This judgment was delivered the day following this speech.
27 *Target Holdings Ltd v Redferns* [1996] 1 AC 421, 434 and 441; *Swindle v Harrison* [1997] 4 All ER 705.

43. Again, there is not time to develop the detail here, but I can convey the difference in the cases where less than proof of "but for" causation is required by making a loose analogy as between the torts of deceit and negligence. For negligence, a plaintiff in general must prove that but for the negligence the loss complained of would not have been suffered. In the tort of deceit, by comparison, the standard is lower. A plaintiff does not have to prove but for causation but only that the misrepresentation was a cause.[28] When ss 52 and 82 of the *Trade Practices Act* 1974 (Cth) came to be construed, the High Court applied the causation test for the tort of deceit under s 82. That a breach of fiduciary duty must be material to the loss, is analogous. That is the causation in fact question. Another way of looking at it is that the inference of causation in fact is readily drawn and it is for the defaulting trustee to prove the loss would have been suffered in any event.

44. There are a number of different points that will fall under the scope of liability question. There are general differences between equitable principle for recovery of compensation and common law principles for recovery of damages to be accommodated. For example, the common law concept of remoteness of damage based on foreseeability does not cross over into equitable compensation.[29]

45. As well, there are differences among the different species of fiduciary duties that will fall under the scope of liability question by recognising the formulation of different standards or tests for the different species.

46. Let me return to our simple example of T the trustee who carried on the family plumbing business for the members of the family as beneficiaries. The liability question is whether T exercised reasonable care, diligence and skill in making the decision to enter into the loss-making contract as trustee.

47. Although, as previously stated, some would say that whether T was negligent is not a matter of fiduciary duty, there are some significant points against that conclusion to be made that are not contentious.

48. **First**, it is a fusion fallacy to suggest that T's duty as trustee was a common law duty. A trustee's duty of care only exists in equity. Before the *Judicature Acts* in 1873 and 1875, no cestuis que trust or beneficiary could have brought a claim against the trustee for negligence in a court of common law.

49. **Second,** a trustee's duty of care, as now affected by s 22 of the TA, was well established by the late nineteenth century, as articulated in 1883 as follows:

> "[the trustee] ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own."[30]

50. This was long before the acceptance of a duty of care against the risk of economic loss was accepted in the tort of negligence in 1964, in *Hedley Byrne*. Indeed, it was long before the general formulation of the duty of care in negligence in 1932, in *Donaghue v Stevenson*.

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28 *Gould v Vaggelas* (1984) 157 CLR 215, 236 and 250-251; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340, 366.

29 *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 500 [38]-[39].

30 *In re Speight; Speight v Gaunt* (1883) 22 Ch D 727, 739, 756 and 762.

51. **Third**, following the approach of Ipp J in *Permanent Building Society*, it is possible to distinguish between a trustee's duty of care, diligence and skill and the proscriptive fiduciary duties (not to make a profit and not to be placed in a position of conflict of duty and interest or duty and duty without fully informed consent). But does that mean that the scope of liability question for a breach of that duty should be less onerous for that duty than it is for the proscriptive duties?

52. This, ladies and gentlemen, is the $64,000 question.[31] As yet no authoritative answer has emerged.

53. I would venture a few observations consistent with the cases so far.

54. **First**, following *Maguire v Makaronis*,[32] *Youyang Pty Ltd v Minter Ellison*[33] and *Pilmer v Duke Group Ltd (in liq)*,[34] all in the High Court, it is reasonable to say that a lot of the commentariat and the lower courts were called upon to reassess the extent of the commonalities between a claim for damages at common law for breach of a common law duty of care in tort and a claim for compensation in equity for breach of the equitable duty of care and skill of a trustee for Australian law. For example, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, was rewritten on the subject in the 5th edition.[35] An important statement, in my view, is made by the authors of the current edition:

> "Shorn of the accounting language and procedures, the principles governing the assessment of equitable compensation for loss suffered by a trustee's breach of duty of care are the same as the principles worked out in the cases on wilful default accounting."[36]

55. There is no doubt that *Maguire v Makaronis* itself is authority for the continuing application of a factual causation question, because of the need to establish an 'adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty'.[37] A recent commentator has suggested that cases since then establish that the factual question is a "but for" question, except where trustees and company directors are concerned, where liability is stricter.[38]

56. **Second,** a continuing source of confusion is the role of *Brickenden* in this context, if any. Some would now suggest that *Brickenden* belongs in the realm of proscriptive obligations, so as to preclude the disloyal fiduciary from setting up an issue as to whether

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31 An idiomatic expression derived from a US 1940s popular radio quiz show named "Take it or Leave It".

32 (1997) 180 CLR 449.

33 (2003) 212 CLR 484.

34 (2001) 207 CLR 165.

35 Compare Chapter 23 in Meagher, Heydon and Leeming, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, (2002, 4th ed, LexisNexis Butterworths).

36 Heydon, Leeming and Turner, *Meagher Gummow & Lehane's Equity: Doctrines and Remedies*, (2015, 5th ed, LexisNexis Butterworths) [23-330].

37 (1997) 188 CLR 449, 473. See also *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262.

38 Hafeez-Baig, "Legal and Factual Causation in Equitable Compensation Claims against Defaulting Fiduciaries" (2018) 46 Aust Bar Rev 79, 93.

the impugned transaction would have been entered into in any event as a basis for resisting rescission.[39] So characterised, it is not relevant to whether loss was caused that can be recovered by an order for equitable compensation.

57. Of course, if *Brickenden* does apply, the advantage of a claim for equitable compensation is clear. But even if it does not, as I would tend to think, the cases suggest a wider scope of liability for breach of the equitable duty of care and skill than its common law counterparts, for the most part because no significant scope of liability question is asked once some causal materiality of the breach of duty is found.

Conclusions

58. These considerations all point in one direction – that there are advantages to casting a money claim against a trustee for breach of the duty of care, diligence and skill as one for breach of an equitable duty, whether or not it is called a fiduciary duty.

59. Outside the trustee and beneficiary relationship, the same thinking may well apply to a company director. As soon as one crosses into that sphere, many statutory obligations also enter the picture. Some of them are subject to proportionate liability.[40] Therefore, if proportionate liability does not apply to a breach of the equitable duty of care, diligence and skill in that context, there is still a potential advantage in the claim for equitable compensation. Even if not, the standard of the scope of liability question in equity may present advantages over the other causes of action. But that is another bridge to cross, outside the scope of what I want to speak about today.

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39 *Short v Crawley [No 30]* [2007] NSWSC 1322, [413].

40 A compensation order under s 1317H for a contravention of s 180 of the *Corporations Act* 2001 (Cth) does not attract proportionate liability legislation: *Dartberg Pty Ltd v Wealthcare Financial Planning Pty Ltd* (2007) 164 FCR 450, 456-459 [16]-[36]; *Yeo v Freeman* [2018] VSC 448, [14]-[47]. However, such claims may be subject to reduction in the circumstances described in s 1317S.