Before the High Court

Fiduciary Law and Access to Medical Records: *Breen v Williams*

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The case of *Breen v Williams*, which is before the High Court on appeal from the New South Wales Court of Appeal,[1] is important for two reasons. First, it raises the question of whether a patient has a legal right, apart from statute, to demand access to his or her medical records from a doctor. Second, it raises general questions about the nature and scope of fiduciary obligations and the use which Australian appellate courts make of precedents on fiduciary law from other jurisdictions.

1. *A Test Case*

The case was brought by Julie Breen as a result of litigation in the United States concerning defective breast implants. It was a condition of settlement of a class action against Dow Corning that Australian claimants had to opt in to the class by 1 December 1994 for a share of a $US4.2 billion settlement. To opt in, it was necessary to provide copies of medical records in support of the claim made. A court could have ordered such records to be produced, but the costs of such a process and the time involved, given the number of litigants, led Breen's solicitors to propose a test case to determine whether a legal right to such records could be asserted by a patient without the need for a court order.

Consequently, a demand for access to her medical records was made upon Dr Williams, whom Breen had consulted when problems with the breast implants had emerged. Dr Williams also performed an operative procedure. It was not part of the plaintiff's case to assert that Dr Williams had been negligent in his treatment. However, he was advised by the Medical Defence Union that his offer to provide the records should be conditional on the patient giving him a release from any claim arising from his treatment of her. The patient declined this offer, and litigation ensued. Bryson J held that she had no right of access to her medical records, and by a majority, the New South Wales Court of Appeal dismissed the appeal.

2. *The Policy Issues*

A number of jurisdictions have legislated to allow patients a right of access to their medical records under certain conditions. In the United Kingdom, the *Access to Health Records Act* 1990 gives such a right. In New Zealand, access

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1 (1994) 35 NSWLR 522.

to medical records is governed, inter alia, by the *Health Information Privacy Code* 1994. In Australia, freedom of information laws in general provide access to records held by public authorities, and the Federal Government has indicated that it will introduce legislation specifically to provide access to medical records.[2] It is likely that such legislation will not be retrospective.[3] Apart from statute, medical records are not totally unavailable to a patient. In a case where the records are of potential significance to a negligence claim, then the court might be prepared to compel their production.

The importance of Breen's case is that if her claimed right is upheld by the High Court (and not subsequently overturned by statute) then it will give patients the right to all their medical records, whensoever they were made, and even though the doctors who made them did so on an assumption that the law does not provide patients with a right of access to them.

As a matter of policy, the question of whether patients ought to have a legal right of access to their medical records is a finely balanced one. In the great majority of situations, doctors will provide patients with all the information they want to know, or will offer an interpretative summary, as Dr Williams did. However, when the relationship of trust breaks down between a doctor and a patient, a legal right to the records might allow a patient to seek advice from another doctor concerning her or his medical condition in circumstances in which a medical report from the first doctor, being an interpretative summary, may not be adequate. In an increasingly mobile society, when patients might seek medical advice fom a range of doctors and specialists in different places over a few years, a right of access to records to take photocopies may also allow a patient to keep a comprehensive dossier of his or her medical condition which would assist doctors in advising appropriately.

There is also something disquieting about the idea that a doctor should have the lawful right to withhold records which are of far more significance to the patient than to the doctor, records *about* the patient which concern deeply private matters, records which in large part may contain notes of communications made by the patient to the doctor concerning her or his symptoms, records which might even demonstrate negligence or other forms of malpractice by the doctor in the treatment of the patient.

On the other hand, there are dangers in allowing a right of access to medical records. In an affidavit,[4] Dr Williams observed that his records contained not only a record of the patient's presenting symptoms, and his observations on examining the patient, but also what he described as his "medical musings about the patient's condition". Doctors' notes not infrequently include the speculative comments and opinions which they need to record from time to time as an aide-memoire of possible diagnoses and which might be considered again in the course of future consultations as more symptoms of an illness or disease emerge. These notes are written about patients, but as Dr Williams observed,

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2 Announcement by the Minister for Health, 16 February 1995. See Freckelton, I, "Patients' Access to Health Records" (1995) 2 *J L and Medicine* 255 at 255–6.

3 The Australian Medical Association (AMA) is opposed to retrospective legislation: see Freckleton, ibid. The *Access to Health Records Act* 1990 (UK) is not retrospective.

4 The relevant contents of this affidavit were quoted or summarised by Kirby P, above n1 at 528–9, and Mahoney JA at 553–4.

they are notes written by himself and for himself, and which sometimes might only properly be understood and interpreted by himself. He emphasised also that the records may contain information provided on a strictly confidential basis by a family member or friend. There may also be letters on file from other medical practitioners containing confidential comments about the patient's condition.

A particular concern of Dr Williams was that medical records may contain information which would be harmful to a particular patient if disclosed, or disclosed without a full explanation, given his or her state of mind or health. During the course of the hearing before the New South Wales Court of Appeal, the plaintiff acknowledged that any right of access to medical reports would have to be subject to a defence of therapeutic privilege, allowing a doctor the right to withhold access to medical records in the best interests of the patient.[5] A similar view has been taken in England concerning the right of access to medical records at common law.[6] Furthermore, the right which is conferred in Britain by statute is a qualified right. Section 5(1) of the *Access to Health Records Act* 1990 (UK) provides:

> Access shall not be given ... to any part of a health record —
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> (a) which in the opinion of the holder of the record would disclose
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> (i) information likely to cause serious harm to the physical or mental health of the patient or of any other individual; or
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> (ii) information relating to or provided by an individual, other than the patient, who could be identified from that information ....

Even the qualified right in English law has its problems. The main concern which it addresses is that patients might be harmed by receiving information which should have been given to them, if at all, in a sensitive manner or that other individuals might be harmed by the inappropriate disclosure of confidential communications. Beyond these concerns about harm to individuals, there are broader issues to be addressed, in particular, the effect of a right of access to medical records on the way medicine is practiced. Judith Trowell, a consultant psychiatrist at the Tavistock Clinic in London, writing with Michael King, has explained the effect of a right of access to medical records has had on the way notes are taken in regard to clinical sessions with children in which child abuse is suspected:

> There is a worrying effect on professional practice arising from the concern among clinical workers that they may be ordered to produce their files in court or make copies of notes of interviews and observations of behaviour available to lawyers. Increasingly, these professionals appear to be writing less and less in the files, and are becoming very circumspect about what they record in writing. Facts can be written down, but impressions, opinions and hypotheses are omitted. The only record of them is kept in the heads of the professional concerned. Yet in the clinical setting we know that it is only as

5 Above n1 at 536–7. The plaintiff also acknowledged that access could be refused to information created or obtained only for the doctor's benefit, such as fees and management records, and also where disclosure would found an action for breach of confidence by a third person (at 537, 556).

6 *R v Mid-Glamorgan Family Health Services Authority ex parte Martin* [1995] 1 All ER 356.

> the opinions and impressions of different professionals come together and are confirmed by other agencies that it is possible to build up a picture of possible abuse ... there is in the area of child protection clearly a price to be paid for ignoring odd inconsistencies, feelings of discomfort or vague impressions. What involvement with the legal system has done is to push these unfocused bits of evidence out of the files into the memories of the various professionals and so reduced the chances of other people involved with the family being made aware of their existence.[7]

Thus the claim that patients ought to have a right of access to their own medical records raises important issues of policy. Not only must a right, if it is recognised, be subject to certain qualifications the application of which might require medical or psychological judgment, but there must be serious question whether, on a utilitarian analysis, such a right of access would be beneficial at all. The doctor-patient relationship depends for its efficacy in part upon the doctor's ethical obligation to act in the best interests of the patient. There are some relationships which are diminished by being analysed in terms of "rights". Lawyers are sometimes in danger of reducing multifaceted issues to a simplistic binary code of rights and their Hohfeldian correlatives[8] in order to allow for the application of legal rules to the problem.

There is a place for the doctor's privacy concerning these notes. A doctor is not without legal obligations. He or she is bound by a legal duty of care to the patient and an ethical (and perhaps contractual) duty to promote the patient's best interests. The purpose of the notes is to aid the doctor in benefiting the patient, but the notes may not necessarily be expressed in terms which would always be beneficial to patients to read for themselves. The law provides remedies both for the wrongful disclosure of confidential communications and for negligent treatment or failure to treat. It is far from obvious that the law needs to go further by providing legal access to those records.

3. *The Legal Issues in the Case*

As Kirby P recognised in the New South Wales Court of Appeal, the issue which the court was presented with was not whether patients should have a right of access to medical records, but whether they do.[9] An initial difficulty which the plaintiff had in bringing her case was to offer any principled basis upon which such a claim could be asserted in law. There is no Australian authority which remotely suggests such a right,[10] no obvious legal basis for asserting a claim to access to those records, no general principle of law with which the present legal position is inconsistent, not even an implied right in the constitution or a clause in an international convention which might clearly be of application.[11] The common law bases upon which the plaintiffs did seek

7 King, M and Trowell, J, *Children's Welfare and the Law* (1992) at 40–1.

8 Hohfeld, W N, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Cook, W (ed), 1923).

9 Above n1 at 526.

10 Kirby P rejected entirely the notion that the High Court's decision in *Rogers v Whitaker* (1992) 175 CLR 479 supported the plaintiff's case: above n1 at 541–2.

11 The decision of the European Court of Human Rights in *Gaskin v United Kingdom (Access to Personal Files)* (1989) 12 EHRR 36 was based upon the terms of the European

to assert such a right were succintly dismissed by Kirby P, and with this part of his judgment, Meagher JA agreed. Kirby P held that the right of access could not be implied as a term of the contract between doctor and patient. He also held that the doctor had proprietary rights in the records since he owned the medium in which they were recorded.[12] On this point, Mahoney JA gave a more equivocal and contextualised answer.[13] The Court of Appeal in England in *R v Mid-Glamorgan Family Health Services Authority ex parte Martin*[14] offered various bases for their opinion that in certain circumstances the doctor might be under a legal obligation to disclose medical records. However, Kirby P, with whom Meagher JA agreed on this point, was unpersuaded by the English court's reasoning because the right was not grounded explicitly in any recognisable legal doctrine.[15] In any event, the right recognised in this case was something less than the kind of right asserted by the plaintiff in *Breen v Williams*.

However, Kirby P was persuaded by the reasoning of the Supreme Court of Canada that the issue was one of fiduciary duty. In *McInerney v MacDonald*,[16] the Supreme Court ruled unanimously that since a doctor is in a fiduciary relationship to the patient, this gives rise to an obligation to allow access to the medical records subject to certain exceptions.[17] La Forest J, who gave the judgment of the court, acknowledged that in characterising the doctor-patient relationship as fiduciary, this does not mean that a fixed set of rules and principles applies in all circumstances or to all obligations arising out of the doctor-patient relationship.[18] However, the right of access to medical records arises because the patient "entrusts" personal information to the doctor for medical purposes.[19] He went on to say:

> The fiduciary duty to provide access to medical records is ultimately grounded in the nature of the patient's interest in his or her records...information about oneself revealed to a doctor acting in a professional capacity remains, in a fundamental sense, one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion somewhat akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise

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Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) which is not parallelled in treaties to which Australia is signatory. In any event, the decision gives only limited support to the idea of a right of access to personal files. At first instance, the plaintiff invoked the concept of peoples' rights to self-determination under the International Covenant of Civil and Political Rights: see above n1 at 531–2. Few stranger arguments can ever have been heard outside of the criminal courts.

12 Above n1 at 538.

13 Id at 559–61.

14 Above n6.

15 Above n1 at 539–41.

16 (1992) 93 DLR (4th) 415.

17 See also *Emmett v Eastern Dispensary and Casualty Hospital*, 396 F 2d 931 (1967); *Cannell v Medical and Surgical Clinic*, 315 NE 2d 278 (1974).

18 Above n16 at 423.

19 Ibid.

> to an expectation that the patient's interest in and control of the information will continue.[20]

La Forest J acknowledged that the right of access is subject to a therapeutic privilege, which should not lightly be invoked, and which may be scrutinised by the courts.

It should be noted that the rationale provided by La Forest J for a right of access to medical records might provide a plausible justification for access to the doctor's record of the patient's presenting symptoms. However, it does not provide any justification for a legal right of access to notes and comments made by the doctor as an aide-memoire to assist diagnosis.

Nonetheless, Kirby P found La Forest J's analysis "wholly convincing".[21] He noted also that the fiduciary principle is "in a state of development whose impetus has not been spent to the present day" and that as society becomes more complex, it is necessary and appropriate for the courts to recognise new fiduciary obligations.[22] By contrast, Mahoney JA found La Forest J's reasoning wholly unconvincing. Meagher JA, in turn, was scathing. He stated:

> No body of equitable doctrine in Australia or in the United Kingdom exists to support the supposed right. The lady's counsel said as much. However, she relied on the recognition of the decisions of certain Canadian courts as to the existence of such a right. These, on examination, do not explain either the origins or the boundaries of the supposed right, or even provide a description (much less a definition) of it. They merely assert it exists. They illustrate a tendency, which has been commented on elsewhere, to widen the equitable concept of a fiduciary relationship to a point where it is devoid of all reasoning. In other words, when analyzing the Canadian jurisprudence in this field, one has the uneasy feeling that the courts of that country, wishing to find for a plaintiff, but unable to discover any basis in contract, tort or statute for his success, simply assert that he must bear the victor's laurels because his opponent has committed a breach of some fiduciary duty, even if hitherto undiscovered.[23]

If this is too harsh an assessment of the quality of reasoning on fiduciary law in Canada, it remains the case that Canadian courts have a much more pragmatic tradition of legal reasoning than exists in Australia, and in relation to equitable principles in particular, the coherence and integrity of doctrine can sometimes be sacrificed where necessary to achieve a particular result.

4. *The Use of Canadian Precedents on Fiduciary Law in Australia*

Kirby P's use of Canadian precedent on fiduciary law to create novel applications of the fiduciary principle is part of a growing trend in Australian courts. On the same day that the NSW Court of Appeal handed down its decision in *Breen v Williams* it also handed down another decision concerning fiduciary law, *Williams v Minister, Aboriginal Land Rights Act* 1983.[24] Joy Williams is

20 Id at 424.
21 Above n1 at 545.
22 Id at 543.
23 Id at 570.
24 (1994) 35 NSWLR 497.

seeking compensation for harm done to her in childhood as a result of a decision made by the Aborigines Welfare Board in 1947 to remove her from a home for Aboriginal children to a home for white children because she was "fair-skinned". A preliminary question arose as to whether the action was barred by the Statute of Limitations. Kirby P decided that there was an arguable case that the Board had breached its fiduciary duty to the child, and the Statute of Limitations would not be applicable to this claim. Priestley JA concurred in allowing the action to proceed.

Kirby P's explanation for the invocation of fiduciary law was as follows:

> The relationship of guardian and ward is one of the established fiduciary categories...The Board was, in my view, arguably obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her custody, maintenance and education. I consider that it is distinctly arguable that a person who suffers as a result of a want of proper care on the part of a fiduciary, may recover equitable compensation from the fiduciary for the losses occasioned by the want of proper care: cf *Norberg v Wynrib*.[25]

There are certain difficulties with this reasoning. First, *Norberg v Wynrib*[26] was not a case of "want of proper care". The doctor in this case prescribed drugs to which the plaintiff was addicted in return for sexual favours. Second, it was only a minority of the Supreme Court of Canada which analysed the case in terms of breach of fiduciary duty. Third, Kirby P's reasoning confuses different sources of obligation. Fiduciaries may owe a number of common law obligations together with their equitable obligations, but the sources of the different obligations must be kept distinct. Thus solicitors owe fiduciary obligations to their clients. They also owe a duty of care[27] and are usually subject to contractual duties.[28] They do not owe a duty of care to their clients *because* they are fiduciaries. Fiduciary law does not subsume all the other obligations which fiduciaries might owe to those to whom those fiduciary obligations are owed. To the tortious liability of the defendants, their fiduciary status is irrelevant.[29]

Kirby P is not the only senior judge to utilise Canadian authority on fiduciary law. Thus in *Mabo v State of Queensland (No 2)*[30] ("Mabo") Toohey J cited the Supreme Court of Canada decision in *Guerin v R*[31] in support of his view that the Crown owed fiduciary obligations to aboriginal titleholders in the exercise of its power to extinguish native title.[32]

One of the difficulties with this invocation of Canadian precedent is that it seems to occur without an appreciation, or at least an acknowledgement, of the vast differences between Australia and Canada in understanding of the nature

25 Id at 511.

26 (1992) 92 DLR (4th) 449.

27 *Hawkins v Clayton* (1988) 164 CLR 539.

28 McDonald, B, "Solicitors' Liability: Tort, Contract or Both?" (1991) 4 *J Cont L* 121.

29 Of course, logical analysis can sometimes be displaced by other factors in cases such as this. Perhaps the life of the law is not logic, but expedience.

30 (1992) 175 CLR 1 at 200–1.

31 (1985) 13 DLR (4th) 321.

32 Above n30 at 199–205.

of fiduciary obligations.[33] Despite the many similarities between Australia and Canada, in this area of law, as in others, we are as much divided by a common law as a common language.

The differences begin at the level of definition. Central to Australian fiduciary law is the notion that a fiduciary is one who has either undertaken to act in the interests of another,[34] creates an expectation that he or she will act in the interests of the other,[35] or is under a legal duty to do so from some other source such as statute law. While this is the main sphere of operation of Canadian fiduciary law also, the Supreme Court of Canada has adopted a much more expansive definition in which it is far from essential to the imposition of fiduciary obligations that the person has given an undertaking or is subject to a legal obligation to act in the interests of another. In *LAC Minerals Ltd v International Corona Resources Ltd*,[36] Sopinka J, with whom the majority of the judges agreed, approved a definition of fiduciary obligations first offered by Wilson J (dissenting) in *Frame v Smith*.[37] That definition has since been approved in other decisions of the Supreme Court of Canada and is widely used.[38] In that case she defined fiduciary obligations as arising where:

> (1) The fiduciary has scope for the exercise of some discretion or power.
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> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
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> (3) The beneficiary is particularly vulnerable to, or at the mercy of the fiduciary holding the discretion or power.[39]

Thus Canadian fiduciary law is as much about the abuse of power and discretion as it is about the abuse of trust. In deciding that parents are fiduciaries in *M(K) v M(H)*[40] La Forest J did not emphasise the relationship of trust but the position of power: "Parents exercise great power over their children's lives, and make daily decisions that affect their welfare. In this regard, the child is without doubt at the mercy of her parents."[41]

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33 For a very useful discussion of the North American case-law, see Finn, P, "The Fiduciary Principle" in Youdan, T G (ed), *Equity, Fiduciaries and Trusts* (1989) at 1.

34 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, per Mason J at 96–7. There are other indicia of fiduciary obligations as well. See Glover, J, *Commercial Equity: Fiduciary Obligations* (1995) ch 3.

35 *Commonwealth Bank v Smith* (1991) 102 ALR 453 at 476. In this case the Full Court of the Federal Court held that in the circumstances, a bank manager had created an expectation in his customers that he would advise them as to their best interests concerning the wisdom of a proposed investment, even though normally banks are not required to act in the interests of customers. Perhaps there is an analogy to be drawn here with the concept of a trustee *de son tort*. One may become a constructive trustee by officiously assuming the obligations of trusteeship: *Re Barney* [1892] 2 Ch. 265; *Mara v Browne* [1896] 1 Ch 199 at 209. In the same way, it may be sufficient to assume fiduciary obligations that without formally undertaking to do so, one assumes the position of acting in the best interests of another.

36 (1989) 61 DLR (4th) 14.

37 (1987) 42 DLR (4th) 81 at 99.

38 See *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 per McLachlin J at 154–5; *Norberg v Wynrib* per McLachlin J, above n26 at 488–93; *M(K) v M(H)* (1993) 96 DLR (4th) 289 per La Forest J at 324–5.

39 Above n36 at 62-3.

40 (1993) 96 DLR (4th) 289.

41 Id at 325. The parent-child relationship was also characterised as fiduciary by McHugh J

There have been some curious applications of fiduciary law in this regard. In one case, a husband was held to have been in breach of his fiduciary duty towards his estranged wife when he made his girlfriend the beneficiary of his pension plan. Because the husband had control of the pension plan pending the resolution of their proceedings for property division on marriage breakdown, he was said to be in a position of power and the wife was at the mercy of his discretion.[42] The *Frame v Smith* test can lead to applications of fiduciary law in situations which would be dealt with according to quite different principles in Australia.

Second, the Canadian courts have sometimes spoken of the fiduciary duty as a positive obligation to act in the best interests of another when traditionally, the relevant obligation has been to avoid a conflict between one's duty and personal interest. For example, an Ontario court decided that a mother was in breach of her fiduciary duties in failing to protect her daughter from sexual abuse by her step-father.[43] Rutherford J stated:

> While the obligations of a fiduciary will vary according to the circumstances and nature of the relationship, in the parent-child context the broad principle that guides and infuses all parental conduct is that a parent must act in the best interests of the child.[44]

She breached this fiduciary obligation in failing to protect her daughter when she knew that the sexual abuse was occurring. To hold that a positive duty to act in the best interests of another flows intrinsically from the fiduciary relationship, (rather than the fiduciary obligations flowing from the duty to act in the other's interests) is to give fiduciary law an entirely new sphere of application. Traditionally, courts exercising equitable jurisdiction have said that fiduciary obligations arise *because* the person is under an obligation to act in the interests of another, and equitable remedies are available where the person places interest in conflict with duty or gains an unauthorised profit from the position. The Canadian courts are in danger of standing this reasoning on its head: because the law deems someone to be a fiduciary, therefore, they have a legal duty to act in the interests of another, and failure to fulfil that positive obligation represents a breach of fiduciary duty giving rise to a claim for equitable compensation. A similar problem arises from the reasoning of Toohey J in *Mabo*. He said: "The fiduciary relationship arises therefore out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise"[45] and that "[i]t is, in part at least, precisely the power to affect the interests of a person adversely which gives rise to a duty to act in the interests of that person".[46] On this view, fiduciary obligations may be imposed whenever

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in *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218 at 317.

42 *Gregory v Gregory* (1994) 113 DLR (4th) 255.

43 *J(LA) v J(H)* (1993) 102 DLR (4th) 177.

44 Id at 182.

45 Above n30 at 203. Emphasis in original.

46 Ibid at 200–1. For another judicial view that fiduciary law is the source of an obligation to act in the interests of another, see Kirby P in *Williams v Minister, Aboriginal Land Rights Act 1983* above n24 at 511: "The Board was, in my view, arguably obliged to Ms Williams to act in her interest and in a way that truly provided, in a manner apt for a fiduciary, for her 'custody, maintenance and education'."

someone is in a position of power and the other is in a position of vulnerability. Fiduciary obligations are then the source of the duty to act in the interest of another rather than a consequence of that duty. This is a novel proposition about Australian law.[47]

Third, as *McInerney v MacDonald*[48] demonstrates, Canadian courts have been willing to use fiduciary law as a source of hitherto unknown rights and obligations. A similar usage of fiduciary law to create hitherto unknown obligations occurred in *R v Sparrow*.[49] The Supreme Court of Canada held that the Canadian government owes fiduciary obligations to its aboriginal peoples. This required it to justify any government regulation which infringes upon or denies aboriginal rights. In the circumstances of this case, restriction of the fishing rights of native Indians had to be justified by a valid legislative objective such as to protect fishing stocks. This balancing of the public interest with the rights of a minority, and the strict scrutiny of laws which impact adversely on minority rights, is reminiscent of the jurisprudence of American constitutional law. It has little to do with the traditional law of fiduciary obligations.[50]

A further example of the creation of unusual fiduciary duties is the Ontario decision of *Gregoric v Gregoric*.[51] A husband was held to be in a fiduciary relationship to his wife in relation to his business decisions. Consequently, he had a fiduciary duty to disclose the real value of the business for the purposes of negotiations towards a property settlement on marriage breakdown.

Fourth, the Canadian courts have exploited the potential which exists from equity's power to award compensation for breach of fiduciary duty[52] to create new forms of civil wrong. Thus the Canadian Supreme Court has held in *M(K) v M(H)*[53] that it is a breach of fiduciary duty for a parent to engage in the sexual abuse of his child. It has also been held, applying the minority opinion of McLachlin J, (with whom L'Hereux-Dube J agreed) in *Norberg v Wynrib*,[54] that a doctor was in breach of his fiduciary duty when he engaged in consensual sexual relations with an adolescent patient.[55]

This usage of fiduciary law to supplement the law of tort, or in certain cases, to create new forms of civil wrong, is alien to Australian law. However,

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47 Although Toohey J cites Mason J in above n34 at 97 as authority for this proposition, the context of this passage is that Mason J has defined a fiduciary as one who "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" (at 96–7). On Mason J's analysis therefore, the power to affect the interests of another is not the source of the obligation to act in the interests of the other. That obligation arises from the undertaking.

48 Above n16.

49 (1990) 70 DLR (4th) 385.

50 For other applications of fiduciary law in this context see *Cree Regional Authority v Canada* (1992) 84 DLR (4th) 51; *Apsassin v Canada* (1993) 100 DLR (4th) 504.

51 (1990) 28 RFL (3rd) 419 at 435–7.

52 *Nocton v Lord Ashburton* [1914] AC 932. See also Gummow, W M C, "Compensation for Breach of Fiduciary Duty" in Youdan above n33 at 57.

53 Above n40.

54 Above n26.

55 *Taylor v McGillivray* (1994) 110 DLR (4th) 64. The sexual relationship began when the patient was 16. For a part of the time in which they had sexual relations, the doctor had also been a foster-parent to the plaintiff. The judge held specifically that her consent was legally valid for the purposes of the tort of battery.

this is one aspect of fiduciary law in Canada which deserves serious consideration as a potential development in Australia. There are strong arguments in favour of extending the Australian law of fiduciary obligations to allow for compensation in cases where trust has been violated and influence abused in a way which does not overlap with the existing law of tort. While this might take Australian law in new directions, it could be justified by equity's traditional concern with the abuse of trust and the protection of the vulnerable. Hitherto, the application of fiduciary law has primarily been in terms of confiscating gains which the fiduciary has made in breach of his or her obligations. If the compensatory jurisdiction is extended, then it may be utilised in situations where a fiduciary has violated his or her position of trust by engaging in the exploitation or abuse of a person to whom fiduciary obligations are owed. To define the sexual abuse of a child by a parent or other trusted caregiver as a breach of fiduciary duty, as the Supreme Court of Canada did in *M(K) v M(H)*,[56] is an apt description not only of the nature of the civil wrong but also of at least one aspect of the trauma it engenders.[57] Similarly, the cases currently at various stages of the litigation process in which religious organisations are being sued by plaintiffs alleging severe physical and sexual abuse when they were in children's homes and schools run by those organisations may reveal fact situations in which the church authorities should properly be regarded as being in breach of their fiduciary duty.[58]

5. *The High Court and Fiduciary Law*

Given the extent to which the Canadian authorities on fiduciary law have been cited in Australia, and the confusion which increasingly surrounds the law of fiduciary relationships, there is a real need for the High Court, in deciding the case of *Breen v Williams*, to make a definitive statement about the scope and limits of the fiduciary principle.

Relevantly, three points could be made in determining the extent to which Australian courts should regard Canadian cases on fiduciary obligations as being a source of persuasive authority for Australian law, and in particular, whether *McInerney v McDonald*[59] should be followed.

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56 Above n40.

57 Betrayal of trust has been said to be one of the "traumagenic dynamics" of child sexual abuse. Finkelhor, D and Browne, A, "Sexual Abuse: Initial and Long-Term Effects: A Conceptual Framework", in Finkelhor, D (ed), *A Sourcebook on Child Sexual Abuse*, (1986).The sense of betrayal arises when the child victims become aware that a person on whom they were dependent, and to whom they looked for protection, has violated that trust as well as violating them physically. The intensity of that sense of betrayal is naturally greatest if the perpetrator is a father or stepfather, since the child is in a closely dependent relationship with this parental figure. The trauma caused by abuse from teachers and other trusted adult figures may also arise in part from a similar sense of betrayal. See also Jones, E and Parkinson, P, "Child Sexual Abuse, Access and the Wishes of Children" (1995) 9 *Int J L and Fam* 54 at 60–75.

58 For example, it might be able to be demonstrated on the evidence that the church authorities put their interest in avoiding scandal ahead of their duty to protect the children when complaints of sexual abuse came to their attention.

59 Above n16.

First, the source of fiduciary obligations is in equity's concern to deter fraud. Breach of fiduciary duty is a form of fraud in the equitable sense.[60] As Viscount Haldane LC explained in *Nocton v Lord Ashburton*, someone may be found to have engaged in "constructive fraud" without an actual intention to cheat. It is enough that he or she has violated the standards which equity imposes, however innocently.[61] It is the broad notion of "fraud" in the equitable sense which justifies courts of equity in holding fiduciaries liable for breaches of duty which may have been motivated by good intentions.[62] The law has a prophylactic role to encourage the highest standards of honesty and fair dealing from those who are in positions of trust and confidence. A legitimate application of fiduciary law must be grounded in equity's concern to prevent fraud.

Second, the kind of fraud which the law of fiduciary obligations is concerned with is the fraud which may occur when a person places personal interest in conflict with duty, or gains an unauthorised profit from a position of trust. These are, as Deane J said in *Chan v Zacharia*, the central themes of fiduciary obligation.[63] All those fiduciary duties which are generic to fiduciaries flow from the two major themes of fiduciary obligation. Thus the strict rules concerning the purchase by fiduciaries of property belonging to those to whom their duties are owed,[64] and the rule concerning the renewal of a lease for the fiduciary's own benefit,[65] are particular applications of the general rules concerning conflicts of interest and unauthorised profits. The fiduciary duty of investment advisers[66] to make proper disclosure of conflicts of interest flows similarly from the central themes of fiduciary obligation identified by Deane J in *Chan v Zacharia*.[67]

There are, of course, other fiduciary duties which certain kinds of fiduciaries have, but these arise from the nature of the particular fiduciary office. Trustees have a duty to allow beneficaries to inspect their records, but this flows from the particular duty which trustees have to account to their beneficiaries for the administration of the trust.[68] The duty to provide access to records is not a duty which is applicable to all fiducaries, and there is no reason in principle why it should apply to doctors.

Third, while doctors may be fiduciaries in a certain sense, they have not traditionally been regarded as fiduciaries for all purposes. They are in a fiduciary position to the extent that they may persuade patients to make them substantial

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60 See Sheridan, L, *Fraud in Equity: A Study in English and Irish Law* (1957); Meagher, R P, Gummow, W M C and Lehane, J, *Equity: Doctrines and Remedies* (3rd edn, 1992) ch 12.

61 Above n52 at 954. See also *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82.

62 *Boardman v Phipps* [1967] 2 AC 46.

63 (1984) 154 CLR 178 at 199.

64 See generally Finn, P, *Fiduciary Obligations* (1977) ch 20. See also Glover, J, *Commercial Equity: Fiduciary Obligations* (1995).

65 *Keech v Sandford* (1726) Sel Cas t King 61; 25 ER 223. *Chan v Zacharia* (1984) 154 CLR 178.

66 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 per Gibbs CJ at 377 (the fiduciary duty of stockbrokers in giving investment advice).

67 Above n63.

68 This point is made by Meagher JA in *Breen v Williams* above n1 at 571. On access to trust records generally, see *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 431–5 per Mahoney JA.

gifts or to make contracts which favour the doctor. Equity provides relief in this situation through the law of undue influence. In this context, doctors are amongst the established categories of those subject to a presumption of undue influence. Doctors are also in a position of trust because confidences are reposed in them. Trustees may be the guardians of our property, but doctors are often the guardians of our secrets. The law protects the privacy of information entrusted by us to our doctors through the law of breach of confidence. However, it is another thing to say that doctors should be included in the list of those who owe general fiduciary duties alongside trustees, solicitors, partners, directors, agents and others who are commonly included.[69] It is notable that one of the cases which La Forest J used in *McInerney v McDonald*[70] to support the proposition that doctors owe fiduciary duties referred to those relationships which give rise to a presumption of undue influence.[71] Before we accept too readily the assumption in the Canadian authorities that doctors are fiduciaries in a general sense, the implications of such general fiduciary status for medical practice need to be carefully considered.

6. *Conclusion*

Breen v Williams concerns an emotive issue. Many will be disappointed if the High Court holds that patients do not have a right of access to their own medical records. However, as this case has travelled through the lower courts, it has become increasingly clear that the issues of policy are complex ones involving competing factors and considerations which are not easily analysed in terms of "rights" and "duties". Furthermore, it has become apparent that it is very difficult indeed to find a legal basis for the asserted right which will stand up to scrutiny.

It is in these situations that courts should be particularly cautious about innovation. In the Australian legal tradition there remains a valid and important distinction between making law and applying it. When the policy issues are as complex as they are in this case, there is a proper place for deferring to the legislature.

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69 Above n34.

70 Above n16.

71 La Forest J cites LeBel J in *Henderson v Johnston* [1956] OR 789 at 799 who characterised the doctor-patient relationship as fiduciary and said: "It is the same relationship as that which exists in equity between a parent and a child, a man and his wife, an attorney and his client, a confessor and his penitent, and a guardian and his ward." Id at 423.