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FIDUCIARY REGULATION OF SEXUAL EXPLOITATION

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The modern revival of interest in the fiduciary jurisdiction has naturally been attended by a discussion of boundaries. In some instances, the debate is now largely concluded. Few commentators, for example, continue to deny the general application of fiduciary responsibility in the commercial sphere. Other boundaries, however, remain controversial. One unsettled area is that of non-economic loss. Different courts have expressed fundamentally different views. A large part of the discussion in this context is concerned with sexual exploitation. What role, if any, is there for the *fiduciary* regulation of sexual contact? In what circumstances should actors be held liable in their fiduciary capacity for sexual exploitation?

Much of the analysis in the fiduciary context suffers from a failure on the part of judges and commentators to fully articulate the social premises and assumptions that inform their conclusions. A proper analysis of any legal boundary must begin with a clear conception of what it is that justifies the particular regulation. While that justification may be either descriptive or normative, it must always be present. Only then may we test the justification itself, and whether the asserted boundaries correspond with that justification. Accordingly, the first part of this essay briefly outlines the policy basis for fiduciary responsibility. In basic terms, this jurisdiction seeks to control the opportunism of those who purport to act for others. The discussion includes a number of general observations about the social and jurisprudential location of

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the fiduciary liability regime. The second part of the essay focuses specifically on the issue of when sexual exploitation will amount to a fiduciary breach. The analysis will produce a set of [sexual] boundaries for fiduciary regulation. It is understood that a different set of boundaries could be constructed on the foundation of a different social justification. The assumption for this essay is that the control of opportunism in general, and sexual opportunism in particular, constitutes the existing social justification for the application of fiduciary responsibility.

Fiduciary Accountability

There are those who regard fiduciary regulation as yet one further manifestation of the suffocating paternalism of the state. That view, at least as a pejorative observation, can not survive even a superficial investigation of this form of social regulation. There is in fact an almost universal consensus on the broad social utility of fiduciary accountability. We engage others to act on our behalf. We give access to our assets for the defined or limited purpose of the undertaking. We recognize, at the same time, that our assets may be diverted or exploited in ways that are not consistent with that limited purpose. Agents may agree to pay higher prices when purchasing goods from firms in which they have a pecuniary interest. A solicitor may purchase property based on confidential information supplied by a client in the course of the client's own land banking efforts. An employee about to embark on a competing venture might use the firm's customer list to solicit business. These are standard examples of fiduciary breaches. Our reaction to the prospect of such opportunistic conduct has been to construct a strict liability regime that requires the full commitment of the actor to the fiduciary undertaking. No benefit can be taken without the fully-informed consent of the beneficiary.

Fiduciary accountability is invariably accompanied by the rhetoric of moral censure and condemnation. The tenor and persistence of this rhetoric is a measure of the depth of our concern. It is not difficult to understand this level of stigmatization. One of our greatest fears is the attack *from within*. Opportunism by those who purport to serve our purposes is perfidious. It is a betrayal by those whom we trusted. It is hypocrisy and infidelity. We uniformly condemn such conduct by the imposition of a strict liability. That liability then serves as a signal to others that a "fiduciary" breach has been committed. Fiduciary accountability is thus a form of regulation *imposed* by the community to serve the *social objective* of controlling opportunism. Stated more broadly, the objective is to maintain the integrity of our fiduciary bonds. Our liability regime represents the set of default terms upon which we will permit actors to act in a fiduciary capacity.

Undue Influence and Breach of Confidence

The fiduciary standard has a wide application in our social relations. This is not well understood in some quarters. Part of the difficulty in comprehending the

full scope of fiduciary regulation is that certain strands of this jurisdiction have developed historically as formally distinct legal doctrines. The two main examples of this independent development are the actions for undue influence (the presumption resulting from a special relationship) and breach of confidence. Each is represented by a distinct case law running parallel to the general fiduciary jurisprudence. This separate treatment might be taken to imply that different substantive concerns are involved in each case. That, however, would be incorrect. There are no substantive differences between these three doctrinal categories with respect to the mischief involved. In each instance, our concern is that the commitment of the actor to the limited purpose of the undertaking will be impaired by the prospect of direct or indirect personal gain. A reading of the cases in each doctrinal category makes this abundantly clear. The judges deciding the cases in each area even employ the same "fiduciary" and "limited purpose" vocabulary. On those few occasions where the issue has been specifically confronted, judges and commentators have simply failed to identify any distinguishing features that would deny the "fiduciary" character of either undue influence or breach of confidence.

Different types of fiduciary breach should of course be treated differently if there are substantive reasons to do so. The difference would then simply represent *contextual* regulation. That does not mean, however, that the essential nature of the obligation is something other than "fiduciary." As it is, there are no significant conceptual differences in the judicial analyses in the three areas. This is readily apparent in the undue influence context, where the notional difference is only in the particular mechanism of the opportunistic conduct. The actor's influence over the trusting party, rather than a direct diversion of value, is the mechanism of the opportunism. This is merely one particular (and narrow) mechanism through which an actor may opportunistically exploit the value of assets. In the breach of confidence context, the analysis essentially replicates the fiduciary analysis in every significant respect. Judges ask whether the information was confidential and conveyed for a specific purpose. That is equivalent to asking whether the actor had access to the information for a defined or limited purpose.

There is only one ostensible (formal) difference in the breach of confidence context that requires elaboration or clarification. The judges have added the qualification that a breach of confidence may be excused if it is justified by other policy considerations. This application of "other" policy considerations, it will be appreciated, operates only after it has been determined that a fiduciary breach occurred. It assumes that the breach can be established, but excuses it for other reasons. This qualification is formally part of the analysis in the breach of confidence context because it is one area where it is assumed that other policy considerations may in some cases take precedence over our concern with opportunistic conduct. We might, for example, excuse an employee who published confidential pharmaceutical notes describing a new drug that cured a serious disease. We accept that in certain cases the disclosure of confidential information will serve a greater social objective and we are therefore content to excuse the faithless fiduciary in those circumstances. At the same time,

however, this "policy" qualification adds nothing substantive to a standard fiduciary analysis. Fiduciary accountability is our own construction and we retain the power [at some judicial and political level] to revisit its policy foundation at any time. It may be unlikely that we will alter the formal fiduciary analysis outside the breach of confidence context in significant ways given the pervasive social contempt for those who abuse our trust, but it is open to us to do so where we conclude that it is warranted. None of this, in any event, changes the *fiduciary* nature of the original breach. The entire analysis prior to the consideration of "other" policy considerations, whether in the breach of confidence or general fiduciary contexts, is concerned with the control of opportunism.

The undue influence and breach of confidence doctrines are simply categories or types of fiduciary responsibility. An analogous categorization is found in the difference between the general law of contract and the specific regimes governing particular types of contracts (eg. consumer contracts, land agreements). Whether there is a contract in each case is determined, for the most part, by the same set of contract rules. However, given our specific concerns in each area, we have installed a number of special rules to accommodate certain features of the subject matter of those types of contracts. None of that changes the essential "contractual" nature of those obligations. Accordingly, while it may be convenient to continue to treat undue influence and breach of confidence cases separately (as we do for different classes of contract), we need not imply from that a fundamental difference in the nature of the regulation. The observation is significant for present purposes because undue influence and breaches of confidence are two of the means fiduciaries may employ to sexually exploit their beneficiaries.

General Legal Obligation

There are a number of general legal regimes that govern human activity. One of these is the law of fiduciary obligation. It shares this role with contract, tort and criminal law. The generality of fiduciary responsibility, however, is masked to some extent by the coincident and concurrent application of the other general forms of obligation. Fiduciary obligation is a different *kind* of regulation and properly applies to a broad range of human action notwithstanding that other types of regulation may be engaged at the same time. The general nature of the fiduciary jurisdiction is also somewhat obscured by the efforts of those who persist in seeking to characterize fiduciary accountability as a category of the law of restitution. Fiduciary responsibility has a clear conceptual basis and the support of a profound community consensus, both of which are lacking in the restitution area. Fiduciary responsibility stands apart as a fundamentally distinct form of general obligation and cannot usefully be captured for the law of restitution. The restitution concept is therefore put to one side as we now briefly review how fiduciary responsibility is distinct from the other general forms of liability. This will identify the ways in

which these other forms, while different, often have a coincident or concurrent operation.

Contractual and fiduciary responsibility relate to each other in a number of ways. First, contracts are often the source of the fiduciary undertaking. The contract might, for example, set out specific fiduciary responsibilities for each of the parties. Alternatively, and more commonly, the contract will create a physical arrangement that attracts fiduciary regulation, either because of the status of the parties under the contract (eg. agency, partnership) or because the physical elements of fiduciary accountability (access for a limited purpose) are contractually established. Where the contract does create a fiduciary obligation, a breach of that obligation will sometimes concurrently be a breach of contract. The fiduciary may instead be in breach of the fiduciary obligation and separately liable for a coincident but distinct breach of contractual obligation. There may be no contractual breach, on the other hand, where the contractual obligation is fully performed but the fiduciary takes a profit by, for example, exploiting the residual value of the assets involved. A second connection between the contract and fiduciary jurisdictions exists in the power of contract to negate fiduciary responsibility. Fiduciary obligations, as default rules, are imposed as a matter of law. Where this is foreseen or anticipated by the parties, they may contract to exclude all or part of their default responsibility. To the extent they do so, the fiduciary obligation will be erased *ex ante* by the contractual agreement. Where they unambiguously agree to exclude all fiduciary responsibility, their relationship simply has no fiduciary component whatsoever. They are perfectly free to do this, if they so choose, and there may be good reasons to do so in some contractual arrangements.

In one sense, both contractual and fiduciary responsibility are about holding actors to their undertakings. Fiduciary obligation, however, is concerned with a particular kind of undertaking. A fiduciary undertakes (contracts) to pursue the interests of another. Standard sales of goods do not have this other-regarding quality. A basic exchange of goods for money occurs without either party agreeing to do some further act on behalf of the other. An exchange, however, may create a fiduciary obligation if it involves one party obtaining access to the assets of the other party for a limited purpose. If the undertaking is breached, we will treat the breach differently than if it were merely a contractual breach for which damages are payable. When the breach is "fiduciary," we allow the trusting party to insist that the fiduciary disgorge any profit. The reason for this different treatment is straightforward. We are offended by a contractual breach, but we are *more* offended by a fiduciary breach. A fiduciary breach is pernicious in a way that a contractual breach is not. It is an attack *from within*. The nature of the breach is different in kind, and we apply a stricter and heavier liability to reflect our greater concern with those who invited us to trust them.

Tortious and fiduciary responsibility are also related in different ways. The two jurisdictions are redundant in one significant respect and operate separately but concurrently in another respect. The redundancy is found in the negligence

context. A number of the early fiduciary cases were concerned with both the duty of care and the duty of loyalty. Both duties were regarded as fiduciary duties because both were ways in which value could be diverted away from the beneficiary. The fiduciary could be either disloyal or careless. With the advent of the general negligence standard, however, fiduciary analysis began to focus almost exclusively on breaches of loyalty. We are now at or near the point where a breach of care *by a fiduciary* will invariably be addressed under the general law of negligence, and not at all under the fiduciary rubric. This is not a necessary approach, however, and it is conceivable that we could return to a "fiduciary" analysis of breaches of care by fiduciaries. As it is, the current reservation of *fiduciary* accountability to *breaches of loyalty* is acceptable for one obvious reason. A breach of care by a fiduciary does not offend us any more than the same negligent act by a stranger. It is only careless conduct - the stench or taint of disloyalty is absent. That is the underlying reason the general negligence standard has been allowed to absorb this aspect of fiduciary conduct.

It is a different matter when we come to consider the intentional torts. The tort of deceit, for example, attracts "fiduciary" liability when committed in the course of a fiduciary undertaking. It is one thing to be defrauded by a stranger. It is quite another to be defrauded by one you have trusted. It is a greater wrong. We expose ourselves to our fiduciaries in ways that we would never expose ourselves to others. This trust and exposure make the act far more offensive than the same act by one who has been kept at arms length. Consequently, we will label the act a *fiduciary* breach, as well as a concurrent tortious breach. The same analysis would apply to a sexual assault facilitated by a fiduciary undertaking. Not all sexual assaults have this quality, but for those that do, we will insist on the civil liability (and communal signal) represented by the fiduciary standard. Accordingly, for intentional torts, the tort and fiduciary jurisdictions perform distinct functions. Tort law is concerned with deterring and compensating intentional tortious conduct. The narrower function of fiduciary responsibility is to deter and compensate the greater wrong of intentional tortious conduct by those who exploited our trust.

A similar analysis informs the distinction between criminal and fiduciary responsibility. The criminal law sanctions those who commit crimes. Fiduciary regulation sanctions only "fiduciaries" who commit crimes, and only when the crime is against the beneficiary. A crime is a more reprehensible act when committed by someone we trusted. We are vigilant with strangers and other third parties, but we expose ourselves to fiduciaries. When they thereafter launch the internal criminal attack, we express our condemnation in both the criminal and civil (fiduciary) forums.

Not every crime committed by a fiduciary will constitute a fiduciary breach. The crime must be connected to the fiduciary access. A sexual assault by a fiduciary, for example, might only be a criminal (or tortious) breach. It will amount to a concurrent fiduciary breach only where the fiduciary relationship is implicated in the commission of the assault. This kind of result is due to the different social functions of the criminal and fiduciary liability regimes. The

criminal law is concerned generally with public order and specifically with a variety of human failings, from dishonesty and negligence through to mental disorder and violent aggression. Fiduciary regulation is concerned with only one failing – succumbing to the self-regarding impulse while acting in the interests of another. That is why many crimes are not fiduciary breaches and many fiduciary breaches are not crimes. There is also a subjective fault requirement in the criminal law that is justified by the potential loss of liberty of the citizen, but which, through its absence in the fiduciary context, implicitly reflects the particularly high level of concern we have for opportunistic conduct.

These are, in basic terms, the distinctions and connections between the general forms of legal obligation. They each perform distinct functions, but are capable of concurrent application. They are layers or dimensions of legal liability and they should apply where the particular physical events engage their respective functions. In this framework, fiduciary responsibility represents our current best effort to suppress the self-regarding impulse. The question for us now is what role does this jurisdiction have in the context of sexual exploitation. That is a question of boundaries.

Fiduciary Tasks

Fiduciary analysis tends to occur at the relationship level. The particular nominate or factual relationship is examined to determine the content of fiduciary accountability. In many cases, however, it is preferable to conduct the analysis on the basis of the kinds of tasks or functions performed by fiduciaries. This has the advantage of highlighting the generic character of fiduciary responsibility and removing the detritus of particular nominate categories. It also offers the economy of a workable analytical shorthand.

There are several functions that have the fiduciary quality. The "agency" function is exercised by, amongst others, agents, directors, partners, solicitors and employees. These actors undertake to act on behalf of others, whether the task involved is purely ministerial or involves the exercise of a wide discretion. A "tutelary" function is performed by parents, guardians, child-care workers and teachers. The task of these actors is to protect and supervise, with or without instruction or teaching. An "advisory" function is performed by agents, guardians, solicitors, physicians, spiritual advisors, financial consultants and other counsellors. Beneficiaries look to these actors for economic, medical, spiritual and emotional guidance. An "allocation" or distribution function is performed by guardians and trustees. Their function is to control the distribution of assets intended to benefit others. A "medication" function is exercised by physicians, dentists and nursing attendants. Patients come to these actors to heal injuries and control pain and physical or mental disease. These are the main kinds of functions that others perform on our behalf. Each of these functions typically involves the actor acquiring access to our property or person for the defined purpose of the undertaking. It is that quality that attracts fiduciary

regulation. Some of these functions, more so than others, serve as effective instruments or platforms for sexual exploitation.

Sexual Exploitation

Whether or not sexual exploitation amounts to a *fiduciary* breach in a particular case depends on (1) the existence of a fiduciary obligation and (2) whether that obligation is implicated in the exploitation in some way. As to the first element, it is obvious that no fiduciary liability can arise if the actor has no fiduciary duty. Fiduciary status must initially be established before proceeding to consider what connection, if any, there might be between the particular obligation and the exploitation. Any kind of fiduciary obligation, whether status or fact-based, will satisfy this first requirement. In the case of the second element, a somewhat more involved analysis may be required.

It should be evident that sexual contact *with a fiduciary* does not, per se, amount to a breach of fiduciary obligation. Thus, in most cases, adult sexual relationships between principals and agents, physicians and patients or solicitors and clients will not give rise to a fiduciary claim. The fiduciary role must somehow be implicated in the exploitation of the beneficiary. It might be supposed that this implication would depend on the nature of the fiduciary task. That, however, would be an incomplete analysis. There is an additional factor that operates in the sexual exploitation context. That factor is the physical participation of the beneficiary in the sexual act. This factor is not present in most other instances of fiduciary opportunism. The fact that the beneficiary must be physically engaged in the sexual action raises the question whether the fiduciary does in fact have access to the sexual capacity of the beneficiary.

The abstract general test for fiduciary status is whether an actor has access to the assets of another for a defined or limited purpose (the "limited access" test). The relevant asset, for this discussion, is the sexual capacity of the beneficiary. There is no conceptual difficulty in treating sexual capacity as an asset. Each of us is possessed of some capacity to produce sexual pleasure or gratification for others. This is an asset like any other asset. It is valuable, and can be exchanged for other goods and services. We use this asset most often to express emotional commitment and to form intimate bonds. Like any other asset, sexual capacity can be exploited.

The range of assets that can be diverted by a fiduciary extends beyond the particular assets immediately required for the performance of the undertaking. Many assets are exposed to fiduciaries as an incident of their primary access. An employee, for example, may have keys to the workplace for the limited purpose of checking gauges during off hours. The employee might take the opportunity while in the shop to use equipment to produce or repair goods for friends or associates. The use of those other assets is a fiduciary breach. Sexual capacity, in this respect, is a type of asset that will only rarely be the primary subject of the limited access. Treatment of sexual dysfunction through therapy or

counselling is one of the few instances where sexual capacity is the direct subject of the fiduciary undertaking. In most cases, access to the sexual capacity of the beneficiary is only incidental to the formal function performed by the fiduciary. A fiduciary obligation of some kind exists, but there is a potential coincident or parallel access to another asset — the sexual capacity of the beneficiary. Teachers, for example, have access to their students for the limited purpose of instruction. Any access they might have to the sexual capacity of their students will be incidental to that defined access. With this in mind, it is now time to explore the matter of access more closely. To do that, it is necessary to introduce into the analysis the social norm of sexual autonomy and the correlative notion of sexual responsibility. It is normally this autonomy/responsibility that precludes or negates open access to sexual capacity in ordinary adult relations, whether or not those relations involve fiduciary obligations.

Each of us is generally responsible for our own sexual welfare. We are taught to recognize and protect ourselves against sexual advances. We are all invested with some level of sexual reserve or caution. We evaluate sexual proposals and then either accept or reject them. We then bear the consequences of those decisions. This is the social expectation, and it is reflected in our legal regulation of sexual contact. No adult actor, in the ordinary case, is privileged over another. Our sexual autonomy requires this initial legal ambivalence. We understand that sexual responsibility is the *quid pro quo* for sexual autonomy. Every adult actor possesses the same capacity to propose or permit sexual contact, and no legal sanction attaches to that conduct alone. A different conclusion is only justified in those cases where sexual autonomy is compromised or undeveloped.

Sexual proposals or contact may, of course, be objectionable. Unilateral physical contact may constitute a criminal or tortious assault. Repeated express proposals, or implicit proposals in the form of suggestive language or behaviour, may constitute sexual harassment. These offensive actions, however, may yet fail to amount to a fiduciary breach. The relative positions of two strangers, obviously, will preclude any *fiduciary* liability for sexual contact. Their contact was not facilitated by any fiduciary undertaking between them.

Our sexual reserve or inhibition represents a check or barrier on access to our sexual capacity. This reserve operates in a fiduciary relation in the same way as it does for any other kind of relation. Agents, for example, will normally have access to various assets of their principals in the course of performing their agency function. They will not be considered to have a coincident access to the sexual capacity of their principals, however, because the sexual autonomy of those principals is assumed to operate. The same assumption initially applies to every fiduciary relationship between adult actors. Each beneficiary is understood to be capable of repelling unwanted sexual proposals. Accordingly, to the extent the assumption holds, fiduciaries do not have access to the sexual capacity of their beneficiaries. Where, however, the autonomy/responsibility assumption

does not hold, it becomes necessary to consider whether an exploitation amounts to a *fiduciary* breach.

The autonomy/responsibility assumption will not apply where the sexual reserve of the beneficiary has been overcome or has yet to develop. A fiduciary may overcome sexual reserve by administering a stupefying substance. A dentist may assault a patient under the influence of a gas or a physician may take advantage of a patient rendered pliant or insensible by a narcotic. In other cases, the fiduciary will have access because the beneficiary has not yet developed the normal sexual reserve of an adult. The obvious case is that of a child (or a mentally impaired adult). Teachers, and others performing a tutelary function, will essentially have open access to sexual capacity because the sexual inhibition of their young students is undeveloped or immature. These cases are, in terms of access, the easy ones. It is more difficult in other circumstances to determine whether the sexual inhibition of an adult has been overcome in a given situation.

Sexual exploitation is only a *fiduciary* breach where the fiduciary undertaking is implicated in the exploitation. In some instances, the role of the fiduciary undertaking is clear. Consider the above circumstances. Actors who are not fiduciaries are also in a position to overcome sexual reserve by administering a stupefying substance. The difference between fiduciaries and other actors in such cases is obviously found in the medicating function of the former. The medicating function is the instrument of the exploitation and is clearly implicated in that sense. Beneficiaries (patients) voluntarily place their physical welfare in the hands of their medicating fiduciaries. They do not knowingly grant that access to others. The difference is a difference in *kind*. Such action by a non-fiduciary is obviously a criminal and tortious breach. The same action by a fiduciary is a criminal, tortious *and fiduciary* breach. A similar analysis applies to cases of sexual exploitation of children. The lack of a fully developed or mature sexual reserve exposes the sexual capacity of children both to fiduciaries and to others. Non-fiduciaries, however, are not liable in a fiduciary way. The difference is again that fiduciaries obtain their access because they are trusted. The attack comes *from within*. The fiduciary relation is implicated because it provided unmonitored physical proximity to the child and that by itself is invariably sufficient to enable the predation. It may be added to this that the specific generic function involved would not be particularly significant, except perhaps to add elements of domination, grooming, authority, undue influence or breach of confidence to the sufficient platform of physical proximity. A further observation is that the ultimate claim for compensation can often be made by both child and parent (assuming the parent is not the exploiter) according to the separate loss each has suffered. Both parent and child are beneficiaries of the limited access in many of these cases.

To this point the discussion has been concerned with cases where access was undeveloped or overcome by external organic means. These are relatively straightforward instances where there is an open access to sexual capacity and a clear connection between the fiduciary undertaking and the exploitation. The more difficult cases involve situations where the normal sexual reserve of an

adult is displaced or undermined in other ways. This may occur through the operation of external events or through manipulation of the fiduciary function itself. Consider those cases where beneficiaries are sexually at risk because events have caused them to question their self-worth or sexual attractiveness. A beneficiary who has been disfigured in an accident or who is going through a divorce, for example, may be particularly susceptible to proposals that imply desirability. These proposals may come from different sources, including both fiduciary and non-fiduciary actors with whom the beneficiary interacts. The diminished sexual reserve of the beneficiary can therefore be exploited by anyone. Accordingly, the simple diminishment of sexual reserve caused by external events cannot by itself create a *fiduciary* liability. For a fiduciary to be liable *qua* fiduciary, the performance of the fiduciary task must somehow be associated with the exploitation. This may not be clear in many cases, but it will have to be addressed when the claim is made. Certainly there are circumstances where the claim will be a valid one. Physicians, solicitors or other advisors may structure their care and counselling to prey on the needs of their beneficiaries. Whether that has happened in a given case is ultimately a question of fact.

Consider next the general class of case where the normal sexual reserve of an adult is displaced solely through the operation or manipulation of the fiduciary task. In contrast to the previous cases, the impairment of sexual reserve is not external. Rather, the fiduciary is able to eliminate or overcome the ordinary sexual inhibition of the beneficiary by taking advantage of some aspect of the fiduciary undertaking. In these cases, the question of access collapses into the question of whether the fiduciary undertaking is implicated in the exploitation. Demonstrating the exploitive conduct indicates both how the sexual reserve of the beneficiary was diminished and how access to sexual capacity was thereby achieved. These cases will often be difficult ones because the decision to submit to sexual contact is made by a beneficiary who initially possesses a fully-functioning sexual reserve. It is clear enough, however, that such cases do occur, and that a *fiduciary* breach is involved. Indeed, there might not even be a concurrent criminal or tortious breach. The only general form of liability will be of the fiduciary kind.

A teacher is unlikely to have access to the sexual capacity of an ordinary adult student. It may be different, however, where the teaching relationship is one where the role of the student is that of apprentice or protégé. The relationship between a graduate student and thesis supervisor is an example. The relationship is typically exclusive (one on one), has an extended duration, and involves a high commitment on the part of the student and wide control by the supervisor. All of these elements amplify the significance of a sexual proposal made by the supervisor. In many cases, however, the sexual contact resulting from the proposal will not amount to exploitation or to a breach of fiduciary obligation. The nature of the relationship might have been a factor in the sexual contact, but only in the sense that it enhanced the likelihood or desirability of consensual sexual relations. There could be cases, on the other hand, where the sexual contact was engineered or facilitated by the supervisor's exploitation of the tutelary function. It might begin with preferred assignments

for the student, meetings scheduled outside school or school hours, or the supervisor insisting on a great deal of personal contact. The supervisor may purport to be particularly impressed by the academic work of the student and hold out the prospect of collaboration. More significantly, the supervisor may imply that rejection of a sexual proposal would risk financial aid, positive job references or support for a thesis defence. At some stage of this progression, sexual contact with the student could be characterized as sexual exploitation. That would likely be the case where the sanctions are tacitly understood and the student is close to completion, has no viable academic alternatives and is justifiably fearful of a confrontation. The supervisor has manipulated the tutelary function to create the conditions that increase the probability of sexual compliance. The sexual contact would not have occurred but for the exploitation of the fiduciary role. If we failed to sanction this kind of behaviour, we would weaken the integrity of these relationships. We would allow the supervisor's commitment to the defined purpose (supervision of the thesis) to be compromised by the pursuit of sexual gratification.

The same basic analysis would apply to other apprentice arrangements. A solicitor acting as a principal to an articling student could be held liable in a *fiduciary* way for employing the tutelary function to extract a sexual benefit. Almost any "apprentice" arrangement has the potential to generate a fiduciary liability. The nature of such arrangements is that the tutelary function frequently involves features that can operate as levers to elicit sexual contact. Apprentice relations commonly involve the assessment or evaluation of the work of the beneficiary by the fiduciary exclusively. An ordinary student, by comparison, is usually separately evaluated by several instructors. Some apprentice relations require the support of the fiduciary to obtain certification or professional standing. Some also involve financial support from the fiduciary. These features and others can be instruments in the fiduciary exploitation of sexual capacity.

Other functions performed by fiduciaries come with different levers. The medicating function has the potentially powerful lever of drug prescription. A physician might extract sexual favours from a patient in exchange for the regular supply of a drug. The advisory function has the lever of disclosure. An advisor may threaten to disclose confidential information acquired in a counselling session in order to ensure sexual compliance. In the case of the allocation function, the ability to determine the quantum of a distribution can be a significant lever. A guardian, for example, might insist on sexual contact before paying a discretionary allowance to a beneficiary. The one function that does not by itself appear to offer much leverage is the agency function. A possible lever might be the threat to withdraw the personal services of the fiduciary. This might be significant in the rare case where the beneficiary is truly dependent on the particular fiduciary, but generally would be insufficient to characterize subsequent sexual contact as a *fiduciary* breach.

The foregoing analysis has investigated circumstances where fiduciary undertakings provide levers that allow fiduciaries to increase the probability of

sexual contact. In other cases, although no levers are available or were employed, adult beneficiaries might still insist that their sexual reserve was wrongly overcome by the fiduciary *qua* fiduciary. These will be the most difficult determinations to make. Many such instances of sexual contact will be consensual. Others will constitute sexual assaults or sexual harassment. A few, however, will involve a *fiduciary* breach. It may be a fiduciary breach because of care and kindness strategically employed by the fiduciary, or, instead, a course of action calculated to undermine the confidence or independence of the beneficiary. The case may be one of undue influence. Ultimately it depends on the circumstances and whether those circumstances demonstrate that the fiduciary undertaking was implicated in the exploitation. We are left, at that point, in the hands of those who enforce this jurisdiction.

Consider, finally, that fiduciary responsibility may arise from sexual contact alone. We normally give access to our sexual capacity for the limited purpose of allowing another to experience the private expression of our love, desire or trust. That limited purpose establishes the fiduciary character of the access. It may be inconsistent with that purpose for either party to take an unauthorized collateral benefit. In such cases, although the contact is ostensibly consensual, it is exploited to achieve a collateral end. An actor, for example, might initiate a sexual relationship in order to acquire greater access to the financial assets of a less vigilant companion. Another actor might secretly film sexual contact with a partner for the purpose of subsequent commercial exploitation. These circumstances are different from those considered above because they are not instances where the sexual reserve of the beneficiary is undermined. They are also different because immediate sexual gratification is not the primary end or objective of the actor. Instead, the actor participates in the sexual contact primarily to further a collateral objective. In that sense, these are not cases of *sexual* exploitation at all. Rather, they are cases of financial gain or exploitation brought about through the instrument of a sexual relationship. Still, they are circumstances that attract fiduciary accountability. The sexual contact establishes the fiduciary obligation and contemporaneously serves as the means to realize a collateral (but primary) objective that is clearly inconsistent with the understood purpose of the sexual access. Accordingly, even ordinary sexual contact is regulated in a specific way by the fiduciary standard. We are not entitled to act opportunistically towards those who have trusted us with their intimacy.

Conclusion

There is no real conceptual debate over *whether* fiduciary responsibility has a role to play in the regulation of sexual exploitation. The question, rather, is what is the scope or extent of that role. The answer to that question depends on our understanding of the social function we assign to the fiduciary jurisdiction. Traditionally that function has been to discipline the opportunism of those who have access to our assets for a defined or limited purpose. Given that policy

basis, fiduciary regulation has a definite and important scope of operation, albeit a limited one. Fiduciary responsibility attaches only to sexual opportunism by fiduciaries exploiting their fiduciary undertaking. The scope of this jurisdiction is therefore distinctly narrower than battery or criminal assault and most conceptions of sexual harassment. It is regulation of a different *kind*. There is no linear liability progression in the sense that because a sexual assault is criminal it must therefore also constitute a fiduciary breach. Fiduciary liability is a distinct layer (and signal) of social condemnation that we apply to a particular species of wrong.

Once we convert the applicable social norms into doctrine, the boundaries of [sexual] fiduciary responsibility become relatively clear. Sexual exploitation can only be a fiduciary breach if the actor involved has the status of a fiduciary. That depends on whether the actor has limited access to the assets of the beneficiary. The second part of the analysis is to determine whether the fiduciary undertaking was implicated in the sexual exploitation. There are two (sometimes conflated) aspects to this second stage of analysis. It is necessary initially to consider whether the fiduciary had access to the sexual capacity of the beneficiary. That access may arise where the sexual reserve of the beneficiary is undeveloped, or diminished by external events. Where that is the case, it is necessary to then ask if the exploitation was facilitated by the manipulation of the fiduciary task. Where sexual reserve was not compromised *ex ante*, the single (conflated) issue is whether the manipulation of the fiduciary undertaking itself wrongly overcame the sexual reserve of the beneficiary. These are the basic sexual boundaries of fiduciary accountability. While conceptually tractable, they are not particularly *sharp* boundaries. That, however, is the nature of this jurisdiction. It is impossible to precognize the nuance of fiduciary opportunism. The conclusion in each case must necessarily be determined by the specific factual relations of the parties.