There are few general treatments of the law of fiduciary obligation. For that reason alone, the new book by Professor Leonard Rotman may be influential. An uncritical acceptance of his expansive analysis, however, would be problematic. I agree that the book is important, but not because it authoritatively frames the jurisprudence. The utility of the book is that it crystallizes or brings to a head the debate over the function of the fiduciary jurisdiction. Divergent (narrow and wide) views of fiduciary responsibility currently cloud the jurisprudence. This then is an opportunity to consider whether we ought to replace the traditional narrow jurisdiction with a broader conception of social regulation. I admire the effort that Professor Rotman has put into this book and I admire his analysis of specific issues, but I do not share his conceptual account. It is a novel vision that, in my view, is both unjustified and uncertain. Others may find his work compelling. Necessarily there is a choice to be made. Until there is a modern consensus on function, it will be difficult to proceed with the coherent development of the fiduciary jurisdiction.

Professor Rotman initially prefaces his discussion with a confusing description of his thesis. He asserts that “the fiduciary concept is not well understood or properly implemented.” That suggests that he believes there is one concept of fiduciary obligation that is proper and accepted, albeit misunderstood. He states that his purpose is to “identify the theory and function of the fiduciary concept” and “uncover [its] governing principles.” The confusion arises when he then states that he will pursue
his task through “the development of a new vision of the fiduciary concept [and] a functional approach for its application.” He appears to have articulated a contradiction. How does one restore (uncover) the conventional or accepted view by formulating a “new vision”? My understanding of the book is that Professor Rotman is offering a normative account of fiduciary responsibility that clearly extends beyond the conventional function. His account is not really about clarifying or uncovering principles. It is about manufacturing them. He appears to believe that fiduciary regulation ought to extend to reviewing the actions of fiduciaries even in the absence of any issue of opportunism. That is a departure from the conventional view. The general confusion that has recently troubled the fiduciary jurisprudence is partially attributable to just this sort of academic exercise. Professor Rotman follows a collection of commentators who have romantic visions of the potential of fiduciary regulation to serve as a general judicial tool to control power or correct injustice.

My critique addresses the fundamental matter of justification, and thereby constitutes a challenge to much of the normative analysis in the book. My objection is straightforward. The conventional function of fiduciary regulation is to control opportunism in limited access arrangements. That is a narrow function, but one that has a wide application because of the human predilection for exploiting limited access arrangements. There is no dispute over that conventional function. It is the baseline, so to speak, for all other proposed conceptions of fiduciary accountability. Some observers, myself included, understand that to be its exclusive function. Others, like Professor Rotman, insist there is a role for fiduciary regulation beyond the opportunism boundary. That is where the confusion begins. The rationale for an extended regulation must necessarily involve a wider concept. The substitute abstractions that have been offered include the control of power, and the protection of vulnerability or reasonable (legitimate) expectation. The difficulty with those abstractions is that there is no sound justification for any of them in the jurisprudence. And unless read restrictively, each

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6 Ibid.
7 See R. Flannigan, “The Boundaries of Fiduciary Accountability” (2004) 83 Can. Bar Rev. 35. I use the term romantic to describe suspicion of rationality, inexperience with guile and misplaced faith in the shared intelligibility of broad concepts (e.g. fairness, vulnerability, justice). A close definition from Webster’s Third New International Dictionary, 1993, reads: “marked by the imaginative or emotional appeal of the heroic, adventurous, remote, mysterious, or idealized characteristics of things, places, people.”
would substantially widen the scope of fiduciary regulation. Moreover, the precise boundary of that wider regulation would be uncertain. The abstractions are notoriously indeterminate and their delimiting boundaries virtually incapable of definition. The same concerns apply to Professor Rotman’s contribution.

Professor Rotman sets out the structure of the book in chapter one. He replicates his earlier apparent contradiction. His goal is to “clarify and contextualize,” but also to develop “foundational fiduciary principles…into an operational vision” and a “functional approach.” The latter objectives, he tells us, will be deferred until chapters five and six. The second, third and fourth chapters will provide “context” for that operational vision and functional approach. In other words, initially he hides the ball. He does not integrate his new vision into the analysis from the outset. Consequently, there is little of interest in those three chapters to readers generally familiar with the subject. The only point of significance to his deferred analysis is the statement of his understanding of the purpose of the fiduciary jurisdiction. For him, it is “to maintain the integrity of socially and economically valuable or necessary relationships of high trust and confidence that are essential to the effective interdependent functioning of society.” There is much in that proposition to excite inquiry and challenge. We must wait, however, until we reach chapters five and six.

Before examining the vision described in chapter five, a number of observations about specific aspects of the material in the first four chapters are in order. First, Professor Rotman makes regular reference to the “flexibility” of the fiduciary concept. In fact, however, conventional fiduciary accountability is known primarily for its lack of flexibility. It is instrumentally strict, admitting no excuse other than consent for a conflict or benefit. The only sense in which it is flexible is that no form of opportunism will escape its application. Judges are prepared to pass through legal forms and fictions to hold fiduciaries accountable. It is certainly not flexible in the sense that it authorizes judicial discretionary justice, which seems to be the sense that Professor Rotman suggests, and which would support his approach.

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9 Flannigan, supra note 7.
10 Supra note 1 at 4.
11 Ibid.
12 Ibid. at 13.
13 Ibid. at 6.
14 Flannigan, supra note 7 at 42-43.
15 Professor Rotman spends several pages (at 6-12) defending the imprecision he associates with judicial discretion.
Professor Rotman also appears to subscribe to the curiously popular view that the imposition of fiduciary liability (both process and potential remedy) is harsh, draconian or punitive. That view lacks substance on any level. If it is “harsh” relative to other liabilities, it is an intended harshness premised on the need to exert a strong control over a septic mischief. Practically, however, it is in no real sense harsh to remove a profit from an actor who has breached an obligation to act for another. The notion of a personal gain is intuitively inconsistent with regard for the interest of others. It would only begin to be harsh (and intentionally so) if a further sanction in the form of a fine or punitive damages were assessed. As it is, given the recognized social importance of conventional fiduciary regulation (manifested in the tone of fiduciary rhetoric), it is not at all clear why additional sanctions of that kind are not regularly imposed. Apart from that, it is of fundamental significance that the consent of the appropriate party will fully cleanse any conflict or benefit. Fiduciaries who choose not to secure that consent have no credible basis for claiming harsh treatment. That reality is not altered because fiduciaries may be technically unaware of their legal status as fiduciaries. They understand that their function is to pursue the interests of others. Moral obtuseness cannot be a relieving consideration in this context. Fiduciary responsibility is explicitly premised on a refusal to inquire into the subjective knowledge or motives of fiduciaries.

In chapter two, Professor Rotman comments on the view, also commonly held, that the fiduciary concept has not been precisely defined, and perhaps should not be precisely defined. Oddly, given his stated mission, he suggests that the concept is not particularly susceptible to definition. As he puts it: “The fiduciary concept, by virtue of its raison d’être, underlying principles, scope of application, and inherent malleability, is inherently resistant to such a reduction.” If, however, the first three of his four considerations are known or knowable (malleability is not a defining characteristic in the relevant sense, or at all), it should be possible to give definition to fiduciary accountability. It will only be incapable of definition to the extent that its function is uncertain, or rendered uncertain by vague claims of purpose. Professor Rotman

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16 That view is repeated continuously throughout the book.
17 See Flannigan, supra note 7 at 43-44.
18 Boardman v. Phipps, supra note 8, is often offered to illustrate the harsh application of fiduciary liability. Boardman was a solicitor who fully understood the strict application of fiduciary accountability and the clear need to secure the informed consent of his principals. He sought that consent but neglected to ensure that it was properly obtained. There was no “harsh” result.
19 Supra note 1 at 30-35.
20 Ibid. at 33.
ultimately concludes that greater certainty, though not precision, is possible: “Although providing the fiduciary concept with a precise definition may be anathematic to its very nature, it is possible to infuse the concept with greater certainty and, therefore, predictability.”21 He has located himself on both sides of the fence. For what it is worth at this point, conventional fiduciary responsibility, which Professor Rotman finds inadequate, does have a relatively precise scope.

More generally, in the course of this particular discussion, Professor Rotman comments on the policy considerations involved. He responds as follows to the claim that fiduciary responsibility cannot be defined because it is not rational:

The fiduciary concept’s function of preserving important interrelationships that drive and facilitate modern human interaction by protecting those who become vulnerable to others through their participation in such relations is inherently rational. The rationality underlying the fiduciary concept’s broad social purpose may be seen in the results achieved through its subordination of individuals’ self-interested tendencies in favour of behaviour that advances human interdependency, facilitates specialized knowledge and skill, and creates wealth. Self-interested behaviour breaks down social and economic cooperation, thereby impeding the efficient operation of human interaction. Subordinating such self-interest by imposing onerous duties on those with actual or effective power over the interests of others in circumstances where those duties are warranted fosters greater cooperation among individuals and entities. This, in turn, facilitates effective interdependent relations and furthers social and economic growth by facilitating the types of specialization that generates informational and monetary wealth. The fiduciary concept is, therefore, more utilitarian in its focus than individualistic. This explains why its goals are more broadly based than much of the common law, which is premised primarily upon doing justice between the parties in individual circumstances.22

As a statement of function, this is all quite vague and therefore unlikely to produce tractable boundaries. What clarity can be expected with boundaries that exist supposedly to protect the vulnerable, or to promote interdependency, specialization, cooperation and social and economic growth? What are we to make of a jurisdiction that is “more broadly based” than “doing justice” between parties? At this point, the new vision appears to be an entirely open-ended notion.

Returning to general observations, there are some propositions in the third chapter that require attention. Fiduciary responsibility did not initially arise, as Professor Rotman suggests, as an extension of trust law

21 Ibid. at 34.
22 Ibid. at 33.
principles. Fiduciary accountability was recognized as an independent general jurisdiction from the beginning of its recorded judicial history. Judges did use trust law terminology, but it was clear in most cases that they were using that terminology to describe a more general obligation. Trust terminology was a linguistic convenience, not an analytical approach. Some judges used the device of analogy, but the more sophisticated jurists understood that the obligation had a general operation.

A second suspect proposition offered by Professor Rotman in this chapter is that fact-based fiduciary analysis was largely displaced by status-based analysis for a time. There has, however, never been a formal retreat or hiatus from fact-based analysis. Both forms of analysis have been consistently employed by the courts. The continuing preponderance of status-based analysis in the cases is attributable primarily to the fact that status identification has evidentiary advantages and that the bulk of fiduciary offences are committed by persons who are status fiduciaries.

A third proposition of interest is found in the discussion of the need for cooperation in commerce generally as a result of interdependency created by specialization. According to Professor Rotman, “the fiduciary concept is a logical choice to secure the efficient operation of contemporary commercial interaction.” Reading these words in their ordinary sense, the potential breadth of function contemplated by that proposition is truly startling, and completely unwarranted.

The remaining bulk of chapter three is a review of definitions and “theories” purporting to inform our understanding of fiduciary accountability. Professor Rotman initially expresses the view that none of the ideas “has entirely captured the spirit of the fiduciary concept and distilled what it is that makes an interaction, or component thereof, fiduciary.” That seems a bit unfair given that his own vision remains undisclosed at this point and the reader is not in a position to evaluate how those ideas measure up against what Professor Rotman would consider the proper view. Apart from that, much of his commentary is wasted analysis. The ideas discussed have been on offer for some time now, and there is no consensus that any of them, at least as Professor Rotman

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23 Ibid. at 57.
25 Supra note 1 at 66-68.
26 See Flannigan, supra note 7 at 49-50.
27 Supra note 1 at 79.
28 Ibid. at 81.
29 Consider the striking proposition found (at 114) in Professor Rotman’s discussion of contract theory. He states that: “In facilitating this self-interest, contract law allows greater leeway for the parties to order their own agreements than the fiduciary concept
describes them, provide a credible conceptual basis for fiduciary accountability. In any event, Professor Rotman seems to find himself in a conflicted position. He again wants to have it both ways. At the end of the chapter, he states that “these theories each attempt, more or less successfully, to capture the essence of the fiduciary concept so that it may be better understood and more appropriately implemented.”30 He then immediately concludes that: “While this goal is laudable, and necessary, it has not yet been achieved by any of these individual theories. [It is] suggested here that these theories, while perhaps unsatisfactory explanations of the fiduciary concept on their own, each present useful ideas that can be drawn upon to form the basis of a more inclusive theory.”31 This looks less like the pursuit of clarity, and more like politically safe appeasement.

We then come to the fourth chapter on historical foundations, where Professor Rotman attempts to ground fiduciary accountability in the general Equity jurisdiction. Unfortunately, apart from a few sentences at the beginning and end of the chapter, nothing in the discussion of Equity is connected to the function of fiduciary regulation. Professor Rotman’s opening remarks are as follows: “The philosophical and jurisprudential underpinnings of the fiduciary concept are premised upon broad notions of fairness, conscience, reason, and flexibility which are entirely reflective of the fundamental tenets of Equity generally and English Equity more particularly. Indeed, the fiduciary concept may fairly be said to be the most doctrinally pure expression of Equity.”32 This appears to suggest that the function of fiduciary regulation is to ensure general fairness. That is meaningless. The same may be said of the unsupported assertion that fiduciary regulation is doctrinally pure Equity. Nevertheless, at the end of the chapter, Professor Rotman insists that: “Considering the philosophical and historical background of the fiduciary concept through an examination of the underpinnings of equitable principles and their roles in various legal systems generally and in Equity specifically provides important insight into the fiduciary concept.”33 That insight, however, is not identified. Nor does he specify exactly how “[t]he discussion herein also serves as a link between the function of Equity, broadly speaking, and its darling, the fiduciary concept.”34 He goes on to offer the confusing assertion that: “As a pure expression of Equity, the fiduciary concept is premised on large and

allows for the parties to fiduciary interactions.” That statement is incorrect. It is conceptually clear that fiduciary obligations can be modified (or excluded) to essentially the same extent that contract obligations can be modified.

30 Ibid. at 151 [emphasis added].
31 Ibid. at 151-52 [emphasis added].
32 Ibid. at 154.
33 Ibid. at 234.
34 Ibid.
liberal notions of fairness and justice. Consequently, attempts to create a
taxonomy from the range of situations where it could be applied is not only
impossible, but misguided. That does not mean, however, that the
principles which underlie the fiduciary concept are not readily
ascertainable.”35 There is an obvious coherence issue here that is passed
over when he concludes that: “What still needs to be explored, though, is
the development of the rudimentary ideas that exist at the core of the
fiduciary concept, including its reason for being.”36 The indication at the
beginning of the chapter was that the core rudimentary ideas would be
developed by this point. That leaves all the heavy lifting to subsequent
chapters.

That brings us to chapter five, where Professor Rotman’s new vision
is revealed. The chapter begins with the assertion that “no one approach or
theory has carried the day.”37 A more accurate proposition would be that
the approaches or theories advanced over the course of the past three
decades have propelled the jurisprudence into a state of disarray and
confusion. Professor Rotman intends in this chapter to formulate “a
doctrinally and historically accurate understanding of the fiduciary
concept.”38 He states:

Achieving such an understanding requires formulating a strong vision of the fiduciary
concept and a methodology for its practical implementation. This two-part process
begins with the development of an “operational” vision that incorporates the history and
purpose of the fiduciary concept. It concludes with the articulation of a functional
approach to the fiduciary concept in Chapter 6 that extols the purposes, values, and
processes of fiduciary principles and establishes the parameters of a functional approach
for the operational vision developed herein.39

Before describing Professor Rotman’s new vision, it is necessary to set
out the conventional view of fiduciary obligation. That will facilitate our
comprehension of the conceptual leap his vision entails. The conventional
function was clearly articulated in a series of cases in the decade straddling
the eighteenth and nineteenth centuries.40 The exclusive function was to
control opportunism in limited access arrangements. It was understood in

35 Ibid. at 235-36.
36 Ibid. at 236.
37 Ibid. at 237.
38 Ibid. at 238.
39 Ibid.
40 York Buildings Co. v. Mackenzie (1795), 8 Bro. 42, 3 E.R. 432; Whichcote v.
677, 31 E.R. 801; Gibson v. Jeyes (1801), 6 Ves. Jun. 266, 31 E.R. 1044; Ex parte Lacey
those cases that fiduciary accountability had general application. It applied to trusts, agencies, partnerships and to all relations of a “confidential character.” There was also a firm consensus that the liability was strict and that only full consent would excuse a conflict or a profit. Those characteristics were appropriate and acceptable because the targeted mischief was regarded, as it is today, as pernicious and pervasive. This conventional view of fiduciary accountability has never been disputed. What has happened, however, is that novel functions have been attached to the fiduciary regime through processes of misdescription and misconstruction. Historically that linguistic confusion originated in the cases dealing with the fiduciary duty of corporate directors.41 The exploitation of linguistic imprecision in that context occurred over the course of the twentieth century, producing the novel ideas that fiduciary responsibility was concerned in some general way with the best interest of the corporation and with whether the purpose of an exercise of power was improper. Then, beginning with the 1984 decision in Guerin v. The Queen, the general fiduciary jurisprudence in Canada was waylaid by a variety of conceptual abstractions that implied that fiduciary regulation extended beyond the mischief of opportunism.42 Importantly, however, none of those abstractions have captured the jurisprudence and, in fact, the Supreme Court of Canada seems to be reasserting the conventional view.43 All of this has been chronicled elsewhere.44 Today, then, we are at a crossroads. We can confirm the conventional position – or we can introduce a novel formulation.

My own work on fiduciary regulation tracks the conventional position. Professor Rotman attempts to locate or situate his vision by contrasting it with my description. Unfortunately, we get only a very general sense of Professor Rotman’s vision from his explanation of the differences between us:

Flannigan’s vision of the fiduciary concept is confined to controlling fiduciaries’ exploitation of their access to their beneficiaries’ assets and opportunities where they use this for personal gain (what he describes as “opportunism mischief”) rather than in the beneficiaries’ interests and for the limited and defined purpose(s) for which it was granted (what he describes as “limited access arrangements”). This view of the fiduciary concept approach is much narrower in scope than what is articulated in the operational vision put forward in Ch. 5, even though it applies to

41 Flannigan, supra note 24.
44 Flannigan, supra notes 7, 24.
a greater number of potential associations than the latter.

The operational vision incorporates Flannigan’s idea of controlling opportunism mischief in limited access arrangements (though not vis-à-vis all relationships, as Flannigan suggests), but extends as well to any abuse of beneficiaries’ interests that destroys the integrity of socially and economically important interactions of high trust and confidence that are necessary for effective social and economic interdependency.45

Professor Rotman appears to understand the conventional boundary of opportunism regulation, but he finds it too narrow (as well as too broad in one respect).46 His description of how his vision extends beyond the mischief of controlling opportunism, however, is couched only in the vague language we have already encountered. We will now investigate whether in chapter five he is able to (or chooses to) give concrete definition to the functional boundary of his broad conceptualization.

Professor Rotman describes his vision of fiduciary responsibility as concerned with the “facilitation of human interdependency”47 and the “protection of trust.”48 He believes only fiduciary regulation is up to the task, the common law being insufficiently flexible and lacking appropriate standards of conduct. He speaks again of specialization, reliance, wealth creation and vulnerability. Those notions reappear at every turn in the chapter, but without further development. The romantic quality of the analysis is evident in an early passage:

Trust that is abused leads to mistrust. Mistrust facilitates generalization and isolationism, which inhibit productivity and reduce the time available for knowledge growth, specialization, and advancement. Individuals’ mistrust forces them into protectionist behaviour. One manifestation of this form of behaviour is the guarding of self-interest through the drafting of complex contractual terms. These actions, in addition to incurring opportunity costs, are inefficient in terms of time and expense and result in excessive self-reliance, which is also notoriously inefficient.

The problem, in brief, is that we intrinsically want to trust others and appreciate the benefits of doing so, but we remain wary of trusting because of the potential for abuse that is afforded by such behaviour. We do not want to make ourselves vulnerable to others; on the contrary, we want to protect our interests from abuse by others.49

It is a romantic vision of humanity to regard the drafting of complex

45 Supra note 1 at 351 (fn 252).
46 See text at notes 55-62 infra.
47 Supra note 1 at 238.
48 Ibid. at 239.
49 Ibid. at 239-40.
contractual terms as an unfortunate sort of protectionist behaviour. The same is true of the characterization of self-reliance as “excessive.” It is of course a sentimental and pastoral vision that everyone should be able to expect and safely enjoy the benefits of vulnerability. Professor Rotman generally casts fiduciary regulation as extending to “those engaged in socially and economically interdependent behaviour” (which on the face of it would appear to be virtually *every* behaviour). That has the look of a very broad reverse “halo” effect, where penance is meted out to those who fail to act with an adequate level of cooperation.  

One expects to find a clear description of Professor Rotman’s vision in the section of the chapter entitled “The Operational Vision.” However, there are only redundant references to the inadequacy of the common law and the now familiar disappointing terminological generalities of specialization, interdependence and trust. The level of generality is illustrated by the statement that “[fiduciary] norms govern the conduct of parties with power over others that result in the latter’s implicit dependency or peculiar vulnerability to the former’s exercise of that power.” That is followed by the statement that: “They require the parties who hold power to act in the best interests of those who are dependent upon its exercise in order to generate confidence in the use of relationships of dependency.” In addition to its generality, the latter statement exposes a failure to distinguish between nominate and fiduciary duties. As explained elsewhere, the best interest duty is not a fiduciary duty. The two duties are parallel obligations.

Eventually Professor Rotman sets out one characteristic of his vision that clearly distinguishes it from the conventional position. His assertion is that “fiduciary interactions will exist only where high trust and confidence akin to the trust and confidence placed in a trustee exists in important social or economic interactions of a more-than-fleeting character.” He begs the question when he then insists that: “This qualification eliminates those relationships which, although indicative of the specialization that exists in contemporary society, do not warrant fiduciary characterization.” The conventional position is that fiduciary

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52 *Supra* note 1 at 250.
55 *Supra* note 1 at 252.
liability arises for any level or degree of breach by anyone with limited access to the assets of others. Fiduciary breaches can be minor and relatively inconsequential (as well as concurrent) in the same way as contract, tort or criminal breaches. That does not change their nature. As Lord Justice Fletcher Moulton observed, even an errand boy will have fiduciary obligations.\textsuperscript{57} Further, ordinary agency, employment, partnership and other status fiduciary relations are not commonly experienced as, or understood to be, relationships of high trust and confidence. This characteristic is another romantic aspect of Professor Rotman’s analysis. It is the one aspect of his vision that is narrower in scope than the conventional view. He is disinclined to concede that opportunism is a generic mischief that requires regulation even in instances of limited access based on subjective low trust. Given the stress on interdependence and cooperation in Professor Rotman’s vision, it seems odd for him to deliver a liability waiver to what appears to be a very large class of lower trust limited access arrangements.

Professor Rotman considers the example of a mechanic.\textsuperscript{58} He concludes that the owner of a vehicle does not require fiduciary protection because there is no high trust and confidence reposed in the mechanic. He thinks that individuals will take less care in the selection of their mechanics than in the selection of their trustees, but he does not explain how that is conceptually relevant (even if true). He also thinks it is important that the potential harm inflicted by a mechanic is “far less important or wide-ranging” than that of a trustee.\textsuperscript{59} That is demonstrably not true and in any event is no more than an irrelevant awkward conceit. It is clear that mechanics are not status fiduciaries. It is equally clear, however, that they can commit fiduciary breaches in the course of their undertakings. The mechanic who takes in a vehicle for a week and uses it throughout that week in a courier business has undoubtedly breached the fiduciary duty that accompanied that limited access. Consider other low trust limited access arrangements. A parking valet commits a classic fiduciary breach when exploiting the contents of the vehicle or the vehicle itself. Waiters in restaurants commit fiduciary breaches when they covertly add charges to the credit cards of diners. Another example given by Professor Rotman is a taxi driver. He insists that a fiduciary label would be an “extreme

\textsuperscript{57} Re Coomber, [1911] 1 Ch. 723 at 728 (C.A.) (“Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him.”).

\textsuperscript{58} The example is from R. Flannigan, “Commercial Fiduciary Obligation” (1998) 36 Alta. L. Rev. 905 at 909, 911.

\textsuperscript{59} Supra note 1 at 252.
characterization.”60 But obviously it is a classic fiduciary breach on the part of the driver to inflate the fare by taking an unsuspecting passenger on a longer route. The fact that these circumstances may not be widely understood to involve fiduciary breaches is due in part to the lionization of fiduciary responsibility by some judges (and Professor Rotman) and to the general failure of the public (and lawyers) to appreciate the scope of the conventional obligation. Professor Rotman may also have conceptual difficulty here because he appears focused on fiduciary relationships, rather than on whether individuals can have discrete fiduciary obligations even when all other aspects of a particular relationship lack fiduciary quality.61

Professor Rotman insists that fiduciary liability can only apply where “dependence and vulnerability [are] acute.”62 He adds that, “more importantly, this acute dependence and vulnerability must arise in the context of a sufficiently valuable or necessary social or economic interaction of high trust and confidence.”63 None of this, however, is developed beyond bare assertion. What, for example, does “acute” mean in this context? Note also that it is not enough for Professor Rotman that the relation is one of high trust and confidence. The relation must also be a sufficiently valuable or necessary one. These, however, are all meaningless notions. They beg the question. What constitutes a relation of high trust? Which of those are sufficiently valuable? The adoption and promotion of these conceptions explodes Professor Rotman’s claim of greater clarity for the fiduciary jurisdiction.

The discussion then turns to “foundational purpose.” Here Professor Rotman sets out his description of the social welfare foundation of the jurisdiction. According to him:

The fiduciary concept’s purpose is not to protect the interests of peculiarly vulnerable parties – which has often been postulated as the principle function of the fiduciary concept – but to facilitate the larger societal goal of preserving interdependent relationships of high trust and confidence. This purpose has the incidental effect of providing protection to those parties whose interest are potentially subject to abuse through their control of others.64

A few pages later, he recasts his comments as follows:

60 Ibid. at 254.
61 Flannigan, supra note 7 at 48-49.
62 Supra note 1 at 253.
63 Ibid.
64 Ibid. at 263.
As a means to protect and further interdependent relations, the fiduciary concept subordinates individual interests to its broad and important social and economic goals. The fiduciary concept’s utility is significantly augmented, however, by the fact that an incidental effect of working towards this greater good has significant grassroots effects as well. Thus, it also safeguards the interests of beneficiaries in fiduciary interactions who are peculiarly vulnerable to their fiduciaries’ potential abuse of power.65

This draws a dichotomy between purposes that is unwarranted. The individual and public interest are congruent, not inconsistent or differing in priority. The conventional function of fiduciary responsibility is to control opportunism in limited access arrangements. We install this form of regulation to maintain the social utility of such arrangements. The mechanism of that regulation is the ascription of liability. It is all one seamless progression from policy to application.

The discussion in the chapter continues on at length, essentially to confirm that Professor Rotman is not really interested in specifying boundaries. His synopsis of fiduciary responsibility remains vague:

It may be seen, therefore, that the fiduciary concept applies to significant (i.e., more than fleeting), socially and economically important or necessary interactions of high trust and confidence between two or more parties in order to maintain the integrity and vitality of those associations. The fiduciary concept is used vis-à-vis these forms of interaction to preserve the interdependency necessary for the specialization that generates fiscal and informational wealth. The fiduciary concept applies only where fiduciaries possesses [sic] power over beneficiaries’ interests that are materially related to the fiduciary element of their interaction and may exercise those powers without the beneficiaries’ consent or the permission of others in circumstances where this arrangement has caused the beneficiaries to become implicitly dependent upon or peculiarly vulnerable to the fiduciaries’ use, non-use, or misuse of those powers.66

Then, under the heading “Open-Ended Application,” he rejects the definition exercise:

Since the situation-specific nature of the fiduciary concept precludes the creation of a taxonomy of fiduciary relations, it follows that the frontiers of fiduciary interaction cannot be authoritatively – or, indeed, accurately – established. Insofar as the fiduciary concept exists to protect and facilitate socially and economically important, or necessary, relations of high trust and confidence, it does not attempt to establish boundaries or limit the types of relationships that may be found to be fiduciary. The only relevant consideration in fiduciary applications is whether the character of the interaction under scrutiny fits within the ambit of the fiduciary

65 Ibid. at 265.
66 Ibid. at 279.
concept and its fundamental purpose.\textsuperscript{67}

Notwithstanding that rejection of elaboration or definition, he concludes the chapter with the statement that: “The operational vision proposed herein establishes the foundational purpose of the fiduciary concept and creates a framework for identifying those relationships that may be subject to fiduciary scrutiny by establishing a conceptual typology of potential fiduciary relations.”\textsuperscript{68} That would suggest ascertainable boundaries. None, however, are identified. The framework and typology remain undeveloped in any way other than a romantic sense. Professor Rotman then states that striving towards a taxonomy is “absurd.”\textsuperscript{69} Instead, for him: “The purpose of this endeavour is to enable the development of a fiduciary ‘instinct’ to assist in determining the circumstances in which the fiduciary concept may be appropriately used.”\textsuperscript{70} An “instinct,” however, will be of little assistance to those who are required to apply fiduciary principles to actual cases. All that we know for sure at this point is that Professor Rotman has an “expanded view” that has taken the fiduciary concept “beyond mere adherence to the rules against fiduciary conflicts and profiteering [i.e. beyond the conventional view].”\textsuperscript{71}

Finding only broad generalization in chapter five, one might have expected detail in chapter six where Professor Rotman describes the “functional approach” that constitutes the second step in his framework. He states that:

The functional approach established herein combines existing precedent with doctrinal necessity to ensure that fiduciary applications maintain fidelity to the fiduciary concept’s fundamental purpose. The functional approach also establishes general principles that allow the fiduciary concept to retain its innate flexibility, but which fix the parameters of fiduciaries’ behaviour to allow for more doctrinally-appropriate judicial determinations of fiduciary interactions and their breach. Therefore, it provides enhanced shape and substance to the range of fiduciary obligations that may be found to exist in a manner consistent with the prescripts of the operational vision.\textsuperscript{72}

In fact, his objectives of establishing “general principles” and providing “enhanced shape and substance” are not realized. After introductory observations, the chapter contains a collection of discussions of disputed issues. There is no identification of widely accepted principles. More

\textsuperscript{67} Ibid. at 283.
\textsuperscript{68} Ibid. at 293.
\textsuperscript{69} Ibid. at 294.
\textsuperscript{70} Ibid.
\textsuperscript{71} Ibid.
\textsuperscript{72} Ibid. at 297-98.
importantly, no particular resolution of these disputes is uniquely associated with the operational vision set out in the previous chapter. These are Professor Rotman’s considered opinions, but no more than that, and cannot be paraded as “general principles.” He must show consensus or that they are general principles in the sense that they follow necessarily from his own vision. The latter is unlikely, however, because his vague operational vision can be tailored to produce any resolution. The disputed territory therefore remains as it was. Taking examples from the chapter: (1) Although conventional fiduciary regulation is proscriptive, some would prefer a prescriptive rule. (2) Do fiduciaries have a duty of disclosure beyond the requirement to disclose in the course of obtaining consent to a conflict or benefit, and if so, is such a duty fiduciary or nominate? (3) What is the operation of the conflict and profit rules? (4) Do fiduciaries have a duty of care different from the general negligence duty? Delegation of duties, contracting out of duties and the duration of duties, all controversial in certain respects, are also addressed in the chapter. Professor Rotman’s contributions to these issues are useful, but they do not end the debates or reveal general principles. Nor do they, as Professor Rotman would have it, “establish some of the implications of the operational vision.”

In chapters seven and eight, Professor Rotman discusses two specific areas of fiduciary interaction, the fiduciary duties of directors and officers and the fiduciary content of the Crown/Aboriginal relation. Though identified as “practical” (as opposed to theoretical) reviews, they are also directed at justifying his operational vision. I have examined these specific areas elsewhere. There is little to say about the chapter on director duties, other than that Professor Rotman has not recognized the differences between open and limited access and nominate and fiduciary duties, both critical to a proper comprehension. The analysis of the Crown/Aboriginal fiduciary relation is also problematic. His analyses of historical sources, legislative background and jurisprudential background do not establish the broad fiduciary duty he claims. Moreover, he has ignored the clear weaknesses in the “fiduciary” jurisprudence in the area. Generally these two areas are illustrations of rogue jurisprudence.

There is no need to extend this review through the remaining few chapters. It is clear at this point that Professor Rotman has not made good
on his promise to clarify the law. On the contrary, his own contribution of a new normative vision will likely only add to the confusion. Even if it were a credible vision in some romantic sense, it does not have discernible boundaries. His analysis is pitched at a level of generality that prevents principled application. More fundamentally, Professor Rotman insists that the fiduciary jurisdiction should extend beyond the control of opportunism to managing the fairness of interactions in relations of high trust and confidence. It seems as if he assumes that those interactions are not currently regulated for substantive fairness. That is plainly not the case. All status fiduciary classes, for example, are regulated by an array of nominate rules that are directly or indirectly designed to ensure fair interaction. Beyond that, Professor Rotman seems oddly sanguine about the general uncertainty, and issues of accountability, associated with the broad judicial discretion he contemplates.

Judges are constantly looking for conceptual tools to allow them to “do justice” as circumstances require. Their efforts are driven in some cases by a sense that the law is otherwise deficient. In every case, however, the effect is to shed (or shred) judicial accountability. That is the consequence when general tools of discretion replace the principled application of accessible legal rules. There have been judicial experiments in the past to produce such tools. Judges and commentators have sought, for example, to elevate the notions of good faith, unconscionability and reasonable expectation into general tools. Those efforts have largely fallen short. The new candidate for the “social conscience” (judicial power) role is fiduciary obligation. For the average legal consumer (client, lawyer or judge), fiduciary doctrine today is sufficiently esoteric, and sufficiently confused, to be susceptible to just that sort of manipulation. A move to expand judicial discretion, however, is a controversial one for all parties, including judges. It is of particular concern in the fiduciary context, where it could lead to the collapse or extinction of the strict operation of the jurisdiction. Professor Rotman, in his zeal to discipline our interdependence, may diminish our primary control on the far more pernicious mischief of opportunism in limited access arrangements. Ultimately, if his vision is adopted, we will let loose a very different beast, and it will be a beast in the sense that it will be extremely difficult to harness.

762-63) raise one last time my concerns with clarity and scope (“This book attempts to furnish the information necessary to allow the fiduciary concept to shed the constraints that have burdened its effective operation for far too long. It is hoped that, as a result, the fiduciary concept may assume a role that is appropriate to its position as the most doctrinally pure expression of Equity.”).
As I indicated at the outset, there is a choice to be made. With the conventional view intact, it amounts to this – Shall we launch ourselves into an intoxicating romantic exploration of how we might regulate interdependence and cooperation in novel ways? If so, has Professor Rotman given us satisfactory direction for that journey?