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ACCESS OR EXPECTATION: THE TEST FOR FIDUCIARY ACCOUNTABILITY

Robert Flannigan*

The argument persists that fiduciary regulation applies where there is a reasonable expectation that one will act in the interest of another. While the notion of reasonable expectation may have the appearance of substance, it is indeterminate and has the potential to radically reconfigure the conventional discipline. The proper (justified) test for fiduciary accountability is limited access.

Un argument désormais persistant veut que les réglementations fiduciaires s'appliquent dans les cas où il existe une attente raisonnable qu'une personne agira dans l'intérêt d'une autre personne. Bien que la notion d'attente raisonnable apparaisse être un critère de poids, elle est imprécise et pourrait radicalement modifier la discipline traditionnelle. Le bon critère (c'est-à-dire celui dont le bien-fondé a été établi) applicable à la responsabilité fiduciaire est celui de l'accès restreint.

A central concern with any form of legal accountability is the reach of its application. It is critical to properly identify who is subject to the regulation. That necessarily depends on the nature of the animating function. The conventional understanding of fiduciary accountability is that its exclusive function is to control opportunism in limited access arrangements.[1] That

* University of Saskatchewan.

1 Robert Flannigan, "The Boundaries of Fiduciary Accountability" (2004) 83 Can Bar Rev 35.

function dictates default accountability for those with a defined or limited access to the assets of others.[2]

The elemental social policy of regulating production opportunism has never been seriously challenged.[3] Recently, however, it has been obscured by mystifying neologistic analysis. Partly because of earlier linguistic inattention, the false impression arose in some quarters that fiduciary accountability lacked definition. That provoked a small industry of model-building that generated numerous discrepant proposals purporting to specify the nature of the regulation.[4] One such proposal was reasonable expectation. The notion initially was promoted by Paul Finn,[5] and now has the hesitant endorsement of Matthew Conaglen.[6] I will examine Finn's views, but primarily I will be concerned with Conaglen's arguments.

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2 *Ibid*. at 36-38. See further Robert Flannigan, "The Core Nature of Fiduciary Accountability" [2009] NZ L Rev 375 (SSRN: 1523382).

3 Those who deny that controlling opportunism is the exclusive function of fiduciary accountability often are unfamiliar with the history of the jurisdiction. Consider Moe Litman, "Fiduciary Law in the Hospital Context: The Prescriptive Duty of Protective Intervention" (2007) 15 Health LJ 295. Litman (at 324) erroneously presumes formal radical indeterminacy ("It is settled law that the rules that regulate fiduciary relationships are not fixed by anything other than the particular circumstances surrounding a relationship.").

4 For an assessment of several proposals, see Flannigan, *supra* note 2 at 399-428. Consider also James Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302. Edelman argues (at 316) that fiduciary duties are voluntary obligations that are not imposed by law: "[T]he thesis here is simply that fiduciary duties arise when they are expressed or implied into voluntary relationships. Therefore, it does not matter which duties are described as fiduciary because they arise in the same manner as any other consensual duty." However, it *does* matter "which duties are described" as fiduciary duties. Legal duties are properly distinguished one from another if they perform different functions. It also is inaccurate to assert that fiduciary accountability is not imposed by law. Actors who assume particular physical arrangements simultaneously assume the associated regulation the community has attached to such arrangements. That regulation is *imposed*, and is avoided only if it is *default* regulation that the appropriate parties agree to vary. Query also Paul Miller, "A Theory of Fiduciary Liability" (McGill LJ, forthcoming). Miller believes that fiduciary power should be understood as "authority" rather than "access." His analysis, however, is largely normative assertion. Beyond that, while he frequently refers to his own vague formulation of the "conventional" position, he evidently has elected to dismiss or ignore the bulk of the conventional jurisprudence. He also argues thinly for a "fiduciary" duty of care, and that the duty of confidence is not an instance of fiduciary accountability. On the duty of care point, see Robert Flannigan, "The Personal Tort Liability of Directors" (2002) 81 Can Bar Rev 247, for a review of the development of the duty of care of directors.

5 Paul Finn, "The Fiduciary Principle" in Timothy Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1.

6 Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart, 2010).

Presumably Conaglen's views (including his critique of limited access) represent the best analysis that presently can be mustered to defend or justify reasonable expectation. Ultimately, however, no compelling justification appears, and reasonable expectation fails as either an alternative or preferable formulation of fiduciary accountability.

The Historical Record

It appears that Conaglen subscribes to the idea that fiduciary accountability evolved by the analogical extension of trust law. He therefore finds it necessary to question my clarification of that supposition. I have shown that fiduciary accountability developed as an independent general form of obligation essentially from the outset, and that it had formally assumed its basic doctrinal shape by the end of the eighteenth century.[7] The judicial analysis was somewhat more sophisticated than merely exporting trust principles by raw analogy. General social policy was consciously applied generically across idiosyncratic arrangements. Conaglen nevertheless insists, based on his own perfunctory historical review, that my analysis is "open to serious question."[8] His first objection is that "fiduciary doctrine was not as fully crystallized by the end of the eighteenth century as Flannigan suggests."[9] Apparently, according to Conaglen, my dating was off by something less than a decade. In his view, the work of Lord Eldon at the beginning of the nineteenth century would have to be included before it could be said that the accountability had "fully crystallized."[10] It should be evident, however, that my view of the historical progression is not dependent on whether the crystallization was substantially complete by 1800 or instead a few years later.[11] Apart from that, it is incoherent to argue that an *independent* fiduciary jurisdiction is the product of the exportation of trust principles to other arrangements. The implication to be drawn from that argument, presumably, is that trust law offers definitive insight into

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7 Robert Flannigan, "The Adulteration of Fiduciary Doctrine in Corporate Law" (2006) 122 LQR 449 at 449-52 (SSRN: 928096). See also Flannigan, *supra* note 2 at 402-403.

8 Conaglen, *supra* note 6 at 19.

9 *Ibid*.

10 Conaglen's critique is disingenuous. In my earlier article (*supra* note 7 at 451-52) I acknowledged Lord Eldon's contribution. I would add that in 1801 Lord Eldon himself described the jurisdiction as well established, referring to it as "the great rule of the Court." See *Gibson v. Jeyes* (1801), 6 Ves Jun 266 at 278, 31 ER 1044.

11 Conaglen states (at 19) that "it is extremely unusual for a legal doctrine to spring forth in a fully formed state." That misrepresents my analysis. I observed inter alia that the cases demonstrated the consistent application of a general policy across nominate categories.

fiduciary accountability. That would be misguided. Limited access arrangements attract fiduciary accountability because of the direct application of our *general* policy decision to control the opportunism that stalks such arrangements.

According to Conaglen there is a second "far greater obstacle" to accepting my analysis.[12] He states that "not one of [the cases I cite] indicates that fiduciary doctrine goes no further than the regulation of opportunism."[13] He argues that the cases "do not provide any evidence that none of the other duties owed by fiduciaries was considered by the courts of the late eighteenth century and early nineteenth century to be fiduciary as well."[14] That is another empty critique. The cases go no further than the control of opportunism, obviously, because that is the particular mischief addressed by the fiduciary form of regulation. Conaglen, however, apparently would have me canvas the entire early jurisprudence in order to establish a latent negative (that no other *fiduciary* mischief is detectable in the case law). It is telling that he does not himself identify any decisions that demonstrate that other duties owed by fiduciaries were considered "to be fiduciary as well." The cases I cited notoriously *do* confirm that fiduciary accountability was from the beginning concerned with controlling opportunism. If there were other cases at the time that articulated a judicial consensus on other "fiduciary" functions, I did not find them.[15] Neither did Conaglen.

Conaglen seems to believe that it is significant that "[m]ost of the earlier cases do not even use the word 'fiduciary,' let alone differentiate between fiduciary duties and other kinds of duties owed by a fiduciary."[16] His point, however, is opaque. What significance is he attaching to the descriptive label? There clearly was a distinct body of cases in the eighteenth century concerned with the mischief of opportunism in limited access arrangements, and the judges in those cases typically did appreciate the difference between nominate and fiduciary duties. It was understood that fiduciaries had nominate duties of performance that were supported by the discrete constraint on the personal exploitation of their acquired access.

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12 Conaglen, *supra* note 6 at 20.

13 *Ibid*.

14 *Ibid*.

15 The language in a few cases might be construed as suggesting a fiduciary duty of care. Consider, in that regard, that "shirking" may be a breach of both care and loyalty. See Robert Flannigan, "The Economics of Fiduciary Accountability" (2007) 32 Del J Corp L 393 at 397-99 (SSRN: 962760). Conaglen does not regard the duty of care as a fiduciary duty.

16 Conaglen, *supra* note 6 at 20

The adoption of "fiduciary" terminology did not occur until some time after the jurisdiction had crystallized. Judges initially used the terminology of "trust" and "confidence."[17] It nevertheless was clear that they understood that the duty of abnegation was of general application and not inherently tied to the trust concept. The trust was just one kind of arrangement subject to what would come to be labeled *fiduciary* regulation.[18] Trust (and confidence) terminology was used in a general or lay sense to describe an assumption of limited access. Some judges did speak explicitly of analogy to trust principles, but even then it was understood that fiduciary accountability operated as a general control on a general mischief.

The move to "fiduciary" terminology actually can be tracked with reasonable precision. Sealy attributed the adoption of the terminology to nineteenth-century textbook writers: "Much of the pioneering work was done by the textbook writers [citing Jeremy (1828), Lewin (1837), Maddock (3rd ed., 1837), Story (2nd ed., 1839)]."[19] But Sealy framed the contribution of the writers too highly and too widely. There was no "pioneering work" beyond using the fiduciary term to accommodate or emphasize the understood general application of the opportunism proscription. Henry Maddock employed the term in his 1815 book with the taxonomic intent that was already evident in the generalized "trust" and "confidence" language of the judiciary.[20] Other writers adopted the usage many years later.[21] Maddock actually used the term only in a single

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17 See Robert Flannigan, "The [Fiduciary] Duty of Fidelity" (2008) 124 LQR 274 (SSRN: 1105525) and Flannigan, *supra* note 7.

18 Arrangements other than trusts defined the jurisprudence from the start of its conventional articulation. See *Pugh v. Ryal* (1725), Sel Cas T King 40, 25 ER 211 (employee); *Whitackre v. Whitackre* (1725), Sel Cas T King 13, 25 ER 195 (agent); *Osmond v. Fitzroy* (1731), 3 P Wms 129, 24 ER 997 (employee); *Walmesley v. Booth* (1739), 2 Atk 25, 26 ER 412 (attorney); *Young v. Peachy* (1741), 2 Atk 254, 26 ER 557 (parent); *Cole v. Gibson* (1750), 1 Ves Sen 503, 27 ER 1169 (employee); *Hylton v. Hylton* (1754), 2 Ves Sen 547, 28 ER 349 (guardian); *Bridgeman v. Green* (1757), Wilm 58, 97 ER 22 (employee); *Welles v. Middleton* (1784), 1 Cox 112, 29 ER 1086 (attorney); *Earl of Lonsdale v. Church* (1790), 3 Bro CC 41, 29 ER 396 (receiver); *Crowe v. Ballard* (1790), 3 Bro CC 117, 29 ER 443 (agent); *Massey v. Davies* (1794), 2 Ves Jun 317, 30 ER 651 (agent); *Lord Hardwicke v. Vernon* (1799), 4 Ves Jun 411, 31 ER 209 (agent).

19 Len Sealy, "Fiduciary Relationships" [1962] Camb LJ 69 at 72 (fn 11).

20 Henry Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, 1815, at 90, 91.

21 Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America*, 1836; Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees*, 1837. Query George Jeremy, *A Treatise on Equity Jurisdiction of the High Court of Chancery*, 1828.

heading,[22] but the content of his ensuing discussion demonstrated that he was partitioning cases (albeit incompletely) that illustrated the general application of the prohibition on unauthorized personal advantage. Subsequently the linguistic transition to fiduciary terminology proceeded gradually until the terminology became dominant in the twentieth century.[23] That transition remains incomplete today as judges and others continue to use the language of trust and confidence to describe limited access arrangements.

It perhaps is helpful to extend this historical review briefly to illustrate how the early jurisprudence manifested limited access accountability. A few illustrations will suffice, as all of the decisions of the time illustrate either explicitly or implicitly that it is the limited (purpose-specific) nature of an access that compels its fiduciary characterization.[24] The first use of the fiduciary term by an English court appears to have been in 1717 in *Bishop of Winchester v. Knight*.[25] A tenant occupying the lands of a bishop had mined and disposed of copper ore, and the bishop sought an accounting from the executor of the tenant's estate. The Lord Chancellor concluded that the bishop had a claim at law in trover, and also a concurrent claim in equity: "[B]ut it is stronger in this case by reason that the tenant is a sort of fiduciary to the lord, and it is a breach of trust which the law reposes in the tenant, for him to take away the property of the lord."[26] The 1726 decision in *Keech v. Sandford* similarly comprehends the limited access basis for accountability.[27] In that case, where a trustee for an infant renewed a lease personally, it was observed that "the trustee is the only person in all of mankind who might not have the lease … for it is very obvious what would be the consequence."[28] The trustee had a unique access to the assets (welfare) of the beneficiary that

22 The heading reads: "Purchases by Trustees and others, in fiduciary Situations, of Trust Property."

23 Nineteenth century judgments employing fiduciary terminology included *Docker v. Somes* (1834), 2 My & K 655, 39 ER 1095; *York and North-Midland Railway Company v. Hudson* (1845), 16 Beav 485, 51 ER 866; *Aberdeen Railway Co. v. Blaikie Brothers* (1854), 23 LT 315 (HL), [1843-60] All ER Rep 249; *Bray v. Ford*, [1896] AC 44 (HL). Consider also *Lamb v. Evans*, [1893] 1 Ch 218 (CA). For a statutory use, see *Marris v. Ingram* (1879), LR 13 Ch D 338.

24 See Flannigan, *supra* note 2 at 376-88. Consider, for example, *Whichcote v. Lawrence* (1798), 3 Ves Jun 740, 30 ER 1248; *Piety v. Stace* (1799), 4 Ves Jun 620, 31 ER 319.

25 (1717), 1 P Wms 406, 24 ER 447. This was a historically isolated use. The term apparently did not reappear again until the nineteenth century.

26 *Ibid.* at 407.

27 (1726), Sel Cas T King 61, 25 ER 223. See also *Herne & Al' v. Meeres* (1687), 1 Vern 465, 23 ER 591; *Walley v. Walley* (1687), 1 Vern 484, 23 ER 609.

28 *Ibid.* at 62.

might be compromised by the prospect of personal advantage. The substance of *Keech* was described in *Blewett v. Millett* as follows: “The trustee’s situation in respect of the estate, gives him access to the landlord; and it would be dangerous to permit him to make use of that access for his own benefit.”[29] Access for a limited purpose was also regarded as the foundation for liability in *Young v. Peachy*, where a father used a conveyance from his daughter for an unauthorized purpose: “It manifestly appears, the conveyance from Fox and his wife was obtained in order to answer one particular purpose, but that the father has attempted to make use of it for a very different one; … that this court has relieved under the head of fraud; for a practice of this sort is a deceit and fraud which this court ought to relieve against.”[30]

Early commentators also recognized the congruence between limited access and the potential for opportunistic diversion. Writing in 1760, Lord Kames described the applicable objective of the equitable jurisdiction: “[Equity] prohibits a trustee [and others noted by Kames] from making any profit by his management [access] directly or indirectly. For however innocent an act of this nature may be in itself, it is poisonous with regard to its consequences. If any opportunity be given for making profit in this manner, a trustee will lose sight of his duty, and soon learn to direct his management chiefly or solely for his own profit.”[31] Maddock offered the same analysis: “The reason why Trustees are not allowed to purchase the Trust Property, seems to be, because, from their situation [their access], and the knowledge it enables them to acquire [their access to information], they may be induced to commit a fraud.”[32] Then later: “Transactions liable to no objection as between Man and Man, have, when between Attorney and Client, been overturned, on account of the danger from the influence of Attornies or Counsel over Clients, while having the care of their Property [access]; and whatever mischief may arise in particular cases, the Law, with the view of preventing public mischief, says, they shall take no benefit

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29 (1774), 7 Bro 367 at 373, 3 ER 238. It will be appreciated that others would have access to the landlord. The access of the trustee was unique in that it was tied to a limited purpose. The specific asset involved was the opportunity to renew. See also *Griffin v. Griffin* (1804), 1 Sch & L 352.

30 (1741), 2 Atk 254, 26 ER 557.

31 Henry Home [Lord Kames], *Principles of Equity*, 1760, at 176 (slightly revised in the second edition, *Principles of Equity* (2d ed.), 1767, at 255). In the third edition, Lord Kames identified this opportunistic conduct as the “most destructive” mischief policed by courts of equity. See *Principles of Equity* (3d ed.), 1778, vol. 2, at 85, 87. The first sentence of the quote (from the third edition) was cited with approval by Lord MacMillan in *Regal (Hastings) Ltd v. Gulliver*, [1942] 1 All ER 378 at 391 (HL).

32 Maddock, *supra* note 20 at 92.

derived under such circumstances."[33] Lewin is equally explicit.[34] His first observation was that it "is a general rule established to keep trustees in the line of their duty, that they shall not derive any the least *advantage* from the administration of [access to] the property committed to their charge."[35] Later, with respect to the rule that trustees are disabled from purchasing trust assets, he stated that the "situation [the access] of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit."[36] He added that "a trustee for the sale of an estate may, by the knowledge acquired by him in that character [a limited purpose access], have discovered a valuable coal-mine under it, and, locking that up in his own breast, might enter into a contract for the purchase to himself. In such a case, if the trustee chose to deny it, how could the Court establish the fact against that denial? The probability is, that a trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded."[37]

Limited access to the assets of others remains the foundation for accountability in our modern jurisprudence.[38] Such access, it should be understood, is broadly conceived as that which permits or enables the extraction of unauthorized gain.[39] In *Reading v. The King*, for example, Asquith L.J. concluded that a fiduciary relation "exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise…and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the

33 *Ibid.* at 94.

34 Lewin, *supra* note 21.

35 *Ibid.* at 288.

36 *Ibid.* at 377.

37 *Ibid.* at 378. Lewin borrowed this "opportunity" example from Lord Eldon in *Ex p Lacey* (1802), 6 Ves Jun 625 at 627, 31 ER 1228.

38 See *Wright v. Morgan*, [1926] AC 788 (PC); *Saltman Engineering Coy Ld v. Campbell Engineering Coy Ld* (1948), 65 RPC 203 (CA); *Boardman v. Phipps*, [1967] 2 AC 46 (HL); *Ultraframe (UK) Ltd. v. Fielding*, [2005] EWHC 1638 (Ch). Query *United States v. Chestman*, 947 F.2d 551 (CA 2d Cir 1991).

39 I have explained that the "asset" concept is widely construed in the fiduciary context. See Robert Flannigan, "The Fiduciary Obligation" (1989) 9 OJLS 285 at 308. The English Law Commission shared that understanding. See *Legislating the Criminal Code: Corruption*, Consultation Paper 145, 1997, Part VII, para. 7.15. See also Flannigan, *supra* note 2 at 379 (fn 10).

negotiation of a contract."[40] The *Reading* decision, which involves a straightforward application of conventional principle,[41] is of particular interest for its description of the detached or indirect exploitation of an asset (wearing an army uniform to reduce the risk of searches).[42] There are numerous other examples of the remote exploitation of assets (including offices and opportunities) in all nominate contexts throughout the jurisprudence.[43]

Limited Access

The historical foundation for limited access accountability is clear. So is its modern analytical utility. Because limited access is congruent with the reach of production opportunism,[44] it is the appropriate test. Conaglen,

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40 [1949] 2 KB 232 at 236. Entrusting the negotiation of a contract to another (class (b)) is but a specific instance of granting limited access. The access that agents acquire to the contracting authority and confidential information of their principals may be exploited for collateral gain. An agent may choose, for example, to contract with X rather than Y because X is an associate (conflict) or offers a kickback (benefit).

41 Some regard the decision as controversial. It, however, is entirely consistent with conventional principle.

42 *Supra* note 40 at 237-38 ("A uniform is in one aspect a physical object. But it is also the vehicle of certain intangible adjuncts – authority, prestige, immunities of various kinds, a certain status and standing. Inter alia it carries with it facilities for imparting a veneer of officialism and legality to transactions which without its imprimatur, would arouse suspicion. These facilities attaching to the uniform the suppliant was bound to use for the master's benefit. It seems not only a natural but an almost inevitable inference from the facts of this case that it was precisely these facilities which Reading sold and Manole bought.").

43 Consider the analysis in *Securities and Exchange Commission v. Falbo*, 14 F Supp 2d 508 at 523 (1998), involving an electrical contractor with building access ("As noted…Falbo was entrusted with a master key to the Grand Met building, allowing him to pass at all times through the entrances to Grand Met's Montvale headquarters and through the security doors enclosing the executive area. The key represents property given by Grand Met to Falbo to enable him to serve Grand Met's interests by completing electrical work in connection with the renovations. Grand Met trusted Falbo with the master key and, in so doing, entrusted him with access to all of the offices in the building. Grand Met relied on Falbo to use that access in a manner consistent with Grand Met's interests. Instead, while working in the executive offices, Falbo eavesdropped and overheard Mary Carroll discussing Burger King. Falbo then used this confidential information, which rightfully belonged exclusively to Grand Met's shareholders, for his own gain. Falbo thus violated his duty to Grand Met by using for personal benefit information acquired by him on account of his access to the Grand Met executive."). Appreciate that the key itself is insignificant. The relevant fact is the limited character of the access or proximity, however acquired.

44 It is necessary to distinguish between production and exchange opportunism. The exchange opportunism that may affect open access arrangements is regulated by different legal controls. See Flannigan, *supra* note 15 at 394-96

however, believes there are "two difficulties with this approach."[45] The first difficulty is that "it is not clear that it differs in any important way from the expectation analysis advanced by Finn."[46] I have elsewhere explained the shortcomings of the reasonable expectation criterion,[47] and I will have additional observations later. Here it is enough to note that reasonable expectation has a capacious potential scope that could easily envelop or absorb limited access. That conceptual absorption, however, does not operate as either a negation of limited access or as a justification of reasonable expectation. Rather, it reveals or exposes one of the difficulties with reasonable expectation. Conventional fiduciary accountability does not extend beyond limited access. A reasonable expectation test of accountability could significantly expand, and possibly simultaneously attenuate the strict character of, fiduciary regulation.[48] Limited access and reasonable expectation are not naturally equivalent or complementary constructions. Conaglen cannot cancel or displace limited access by the indirection of subsuming it in a fog of reasonable expectation.

The second difficulty Conaglen finds with limited access is that "it is flawed in that it fails accurately to capture the difference between fiduciary and non-fiduciary situations."[49] He asserts that "the limited access concept does not accurately predict which relationships will be held to involve fiduciary duties and which will not."[50] He refers specifically to mortgagees (and other pledgees/creditors), holders of easements and co-owners as persons having a limited access without fiduciary accountability. His argument is that the limited access test would wrongly assign fiduciary character to those arrangements. It should be evident, however, that he fails to comprehend either the nature of the arrangements or the conventional concept of limited access.

Consider first his easement holder and co-owner examples. It must be obvious that an easement is a grant of *open* access. Holders secure some right of access *for their benefit*, not the benefit of the owner of the burdened property. There of course is a limitation inherent in the easement itself in that it represents a restricted right with respect to the

45 Conaglen, *supra* note 6 at 251.

46 *Ibid.*

47 Flannigan, *supra* note 1 at 58-60, 73-75 and *supra* note 2 at 418-19.

48 The same concerns exist for the other general criteria that have been advanced in the past to "define" fiduciary accountability (e.g. vulnerability, power, discretion). On discretion, for example, see Robert Flannigan, "Fact-based Fiduciary Accountability in Canada" (2010) 36 Advocates' Q 431.

49 Conaglen, *supra* note 6 at 251.

50 *Ibid.* at 252.

property. But that restricted right is an open access. There is no undertaking to use the right to benefit the owner of the property. Unauthorized encroachments on the property will be separate distinct wrongs. If, for example, holders exploit their rights of entry by taking crops from the property, that is a matter dehors the easement relation. That action would be a trespass or conversion. Easement holders who encroach on the subject property beyond their easement rights are in the same position as strangers. Their conduct does not involve a fiduciary breach because they do not have access pursuant to an undertaking to serve the interest of the owner. So it is with co-owners. They acquire and hold their partial rights on or for their own account. In the absence of contractual constraints, they are entitled to exploit *their interests* in the undivided property as they see fit. They may alienate their rights whenever and to whomever they wish. Appreciate again that they possess a restricted property right, but that right is for an open access. If they do pass beyond mere co-ownership, if for example they jointly conduct a business using the property, or confer authority on each other, they will have overlaid a limited access on their co-ownership, and will have created a partnership or agency that attracts status fiduciary accountability.[51] Additionally, a fact-based accountability may arise at any point where a limited access arrangement exceptionally is associated with the co-ownership relation. Short of those possibilities, there is no fiduciary obligation. Accordingly, neither the law of easements nor the law of co-ownership is inconsistent with the limited access basis for fiduciary accountability. Nor, as we now see, is the law that constrains the power of sale of a mortgagee.

Conaglen did not offer any analysis to support his easement and co-ownership examples. He did, however, purport to justify his mortgagee example:

> [M]ortgagees have access to the property of their mortgagors that is limited, in the form of powers to take possession of and to sell the property to recoup the outstanding debt. Courts have repeatedly emphasised that a mortgagee's powers must be exercised consistently with the fact that its interest in the mortgagor's property is granted only "as a security for the payment of a debt or the discharge of some other obligation for which it is given". Yet, the mortgagee does not owe fiduciary duties with respect to the exercise of its powers over the mortgagor's property, notwithstanding that his is

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[51] On the relation between co-ownership and partnership, see Robert Flannigan, "The Control Test of Principal Status Applied to Business Trusts" (1986) 8 ETQ 37 at 46-47 (fns 33, 34).

> "always a qualified and limited righ" of access to the property: "it never remains in his hands cloathed with any fiduciary duty."[52]

Apart from his misconceived final sentence, the difficulty with Conaglen's description of the mortgage relation is his undeveloped specification of mortgagee access as limited. The mortgage relation has dimensions of both open and limited access.[53]

Mortgagors charge property to secure the monies they borrow. They grant rights to their mortgagees to sell the charged property. Those rights are conveyed to mortgagees for *their* benefit. Accordingly, as an open access, that dimension of the mortgage relation has no fiduciary character. Mortgagees may during the term of the mortgage harbour undisclosed interests that are in conflict or competition with the interests of mortgagors. Mortgagees are also entitled to transfer their mortgage interest to whomever they wish for whatever benefit they can command. That does not, however, end the issue of fiduciary accountability.[54] An obvious status accountability arises with respect to the personal information that mortgagors convey to mortgagees in order to acquire funds. That information is confidential. It is provided for the limited purpose of establishing identity and creditworthiness. It would be a fiduciary breach for mortgagees to exploit the information for unauthorized gain.

There is another status accountability that constrains mortgagees. It arises at the point of realizing on the charge once the decision to realize is taken. Mortgagees, while not formal trustees, must act disinterestedly in the course of their realization. They cannot, for example, sell to themselves at an undervalue or sell to others in exchange for a bribe. The very cases that Conaglen cites, contrary to his critical agenda, confirm that duty.[55] In *Warner v. Jacob*, Kay J. properly noted that the power of sale of a mortgagee is "for his own benefit, to enable him the better to realize his debt" (the open access dimension).[56] However, he immediately

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52 Conaglen, *supra* note 6 at 252.

53 Conaglen anticipated an open access response to his objection and sought to intercept it with a footnote comment (at 253, fn 42) that is devoid of substance: "If the answer to this objection to the limited access analysis is that a mortgagee has 'open access' for these purposes, the weak analytical value of the limited access concept is thereby further revealed."

54 As for all arrangements, there potentially may be a fact-based fiduciary accountability that will depend on the particular facts of the specific relation. Beyond that there are elements of status accountability.

55 I include the cases cited in footnote 35 at page 38 of Conaglen, *supra* note 6. Consider also Conaglen's flawed differentiation (at 78-79) of the "genuine transaction" rule.

56 (1882), 20 Ch D 220 at 224.

qualified that proposition when he stated that the mortgagee must exercise the power "*bona fide* for that purpose, without corruption or collusion with the purchaser" (the limited access dimension).[57] That is, the mortgagee's realization of the security is constrained by what plainly is the *fiduciary* duty to control opportunism (expressed as a duty of good faith). The access of mortgagees, at the point of realization, is understood to be limited to a bona fide alienation of the property ultimately for the benefit of both parties. Open access changes to limited access after the realization decision is made, and that attracts fiduciary accountability. The same fiduciary qualification, along with a duty of care,[58] was reiterated in *Farrar v. Farrars, Limited*.[59] Lindley L.J. first observed that it was "perfectly well settled that a mortgagee with a power of sale cannot sell to himself either alone or with others, nor to a trustee for himself."[60] He later declared that the realization efforts of a mortgagee could not be challenged "if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price."[61] Thus, the access of mortgagees is limited to an objective or rational realization of the security.[62] Mortgagees cannot engage their self-interest beyond their authorized benefit. The remaining cases Conaglen cited, most of which

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57 *Ibid*. Kay J. relied in part on the observations of Vice-Chancellor Stuart in *Robertson v. Norris* (1858), 1 Giff 421 at 424-25 ("Lord Eldon, in the case of *Downes v. Glazebrook* (3 Mer. 200), and in *Chambers v. Goldwin* (9 Ves. 271), and in *Cholmondeley v. Clinton* (2 Jac. & W. 1-90), has stated the principle on which this Court proceeds when the question is as to the validity of a sale effected by a mortgagee under a power of sale. Lord Eldon says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression is to be understood in this sense, that, the power being given to enable him to recover the mortgage money, this Court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage money, if he uses the power for another purpose – from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals – the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended.").

58 A degree of conflation or confusion in the demarcation of the duties of good faith and care is evident in subsequent cases. That may be attributable in part to the fact that failures of care may reflect or accompany bad faith.

59 (1888), 40 Ch D 395 (CA).

60 *Ibid.* at 409.

61 *Ibid.* at 411.

62 Stated another way, mortgagees acquire access (pursuant to their realization power) to the "equity" (residual value) interests of mortgagors. They are not entitled to appropriate that "equity" for themselves or their associates. They are entitled only to that portion of the fair or objective value of the property that satisfies the outstanding obligation.

were focused on the duty of care, concede the duty of good faith associated with realization.[63] Other authorities further confirm the continuing imposition of the good faith constraint on the exercise of a power of sale.[64] Accordingly, there are dimensions of both open and limited access in the mortgage relation that are accommodated in conventional mortgage law and treated consistently with the conventional understanding of fiduciary accountability.[65]

In the end, none of Conaglen's examples (mortgagee, easement holder, co-owner) support his critique that the limited access test extends accountability beyond proper borders.[66] Nor do his historical or linguistic objections have any substance. Yet he is confident that "the concept of limited access … fails to provide a criterion that accurately predicts whether fiduciary duties will be owed in a given situation."[67] His analysis, however, does not come close to establishing a foundation for that conclusion. I now turn to consider what function Conaglen assigns to the fiduciary jurisdiction, and how (or if) his view of function informs his support for reasonable expectation.

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63 Consider *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.*, [1971] 1 Ch 949 (CA); *Burgess v. Auger*, [1998] 2 BCLC 478 (Ch).

64 In England, see *Martinson v. Clowes* (1882), 21 Ch D 857; *Pooley's Trustee v. Whetham* (1886), 33 Ch D 111; *Hodson v. Deans*, [1903] 2 Ch 647; *Haddington Island Quarry Company, Limited v. Huson*, [1911] AC 722 (PC); *Waring v. London and Manchester Assurance Company, Limited*, [1935] Ch 310; *Medforth v Blake,* [2000] Ch 86 (CA) 180. In Australia, see *Latec Investments Ltd v. Hotel Terrigal Pty. Limited* (1965), 113 CLR 265 (HCA); *Forsyth v. Blundell* (1973), 1 ALR 68 (HCA); *Australia and New Zealand Banking Group Limited v. Bangadilly Pastoral Co. Pty. Limited* (1978), 139 CLR 195 (HCA); *Kravchenko v. Rock Building Society*, [2009] VSCA 292. In Canada, see *Logozzo v. Toronto Dominion Bank* (1999), 181 DLR (4th) 221 (Ont CA).

65 The same analysis applies contextually to the other pledges/securities discussed by Conaglen, *supra* note 6 at 253.

66 In a footnote (*ibid.* at 254, fn 49), Conaglen adds the example of a mechanic. He believes his mortgagee, easement holder and co-owner examples undermine my analysis explaining how mechanics are exposed to fiduciary liability. See Robert Flannigan, "Fiduciary Mechanics" (2008) 14 CLELJ 25. He chooses not to confront my analysis, however, and again retreats to vacant commentary: "If the limited access criterion does not accurately predict whether other actors owe fiduciary duties, it cannot confidently be used to do that with respect to mechanics."

67 Conaglen, *supra* note 6 at 254.

The Function of Fiduciary Accountability

I explained long ago that fiduciary accountability is an independent regime of general regulation that has a *parallel* application with the distinct arrays of rules that govern the performance of idiosyncratic limited access undertakings.[68] It is not necessary here to describe in detail the nature of the accountability. Full accounts are available elsewhere.[69] In outline, persons who have access to the assets of others for a limited purpose may divert the value of those assets to themselves or their associates. That may happen in every kind of limited access arrangement. Recognizing that mischief, judges have imposed a proscription on any unauthorized conflicts or benefits.

The operation of the jurisdiction is clear. It applies concurrently with the various forms of idiosyncratic regulation that govern the performance of different nominate undertakings. The idiosyncratic performance of, for example, trustees, agents and guardians is governed by the law of trusts, agency and guardianship. The self-regarding impulses of those actors are simultaneously governed by fiduciary accountability. The necessary insight is that the independent parallel operation of the fiduciary jurisdiction is merely doctrinal recognition of the need to regulate a singular mischief of pervasive ambit. Opportunism is latent in all limited access arrangements and, consequently, the regulation has a generic mischief-specific application across all such arrangements.

Conaglen summarizes his view of fiduciary accountability in the following terms:

> The central thesis advanced in this book is that the fiduciary concept of "loyalty" is a convenient encapsulation of a series of legal principles, rather than a duty in its own right. These principles provide a subsidiary and prophylactic form of protection for non-fiduciary duties. The purpose of that protection is to enhance the chance of proper performance of those non-fiduciary duties by seeking to avoid influences or temptations that are likely to distract the fiduciary from providing such proper performance. It is frequently observed that fiduciary doctrine operates in a prophylactic manner, which is undoubtedly the case. However, the argument developed here is that fiduciary doctrine is prophylactic in its very nature, rather than simply in the methodology that it employs. It is designed to make breaches of non-fiduciary duties less likely by protecting them from inconsistent temptations that have a tendency to distract the fiduciary away from

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68 See Robert Flannigan, "Fiduciary Obligation in the Supreme Court" (1990) 54 Sask L Rev 45; "Commercial Fiduciary Obligation" (1998) 36 Alta L Rev 905; "The Limits of Status Assertion" (1999) 21 Advocates' Q 397.

69 Flannigan, *supra* notes 1, 2.

> due performance of those non-fiduciary duties. This also indicates the subsidiary nature of fiduciary doctrine, in that it is designed to assist with ensuring proper performance of non-fiduciary duties. In that sense fiduciary duties are subsidiary to the protected non-fiduciary duties.
>
> The clearest example of this prophylactic and subsidiary form of protection is found in the principle that prohibits fiduciaries from acting in situations in which their personal interest conflicts with the non-fiduciary duties that they have to perform. The existence of such a personal interest increases the risk that the fiduciary will be drawn away from, and so not deliver, proper performance of those non-fiduciary duties. Fiduciary doctrine therefore prohibits a fiduciary from acting in situations that involve conflicts of that nature, unless he makes full disclosure to the principal of all material facts and obtains the principal's fully informed consent.[70]

Without more, that summation might lead one to conclude that Conaglen endorses the conventional position – that the jurisdiction is a parallel regime of accountability designed to control the mischief of opportunism. In a previous article, I had assumed that to be his position.[71] It appears, however, that Conaglen has a different view.

The argument Conaglen advances is that fiduciary accountability is a "subsidiary" [parallel] regime of regulation designed to "protect" the performance of "non-fiduciary" duties.[72] What then, for him, is the mischief that requires this protection? The quoted material might suggest that he believes that fiduciary accountability protects beneficiaries from opportunism (influences or temptations, personal interest conflicts). Apparently, however, that does not exhaust his thesis. His "protection" appears to be more open-ended in some indeterminate respect. He does not at any point acknowledge that controlling opportunism, in all its infinite production manifestations, is the *exclusive* function of the jurisdiction. Throughout his analysis he regularly frames the function in abstract terms without restriction to opportunism. For example, at a late stage, he asserts without elaboration or qualification that the "core" policy is "a concern to provide a subsidiary and prophylactic form of protection for non-fiduciary duties."[73] A short while later he states that the "clear purpose … is to provide subsidiary and prophylactic protection for non-fiduciary

70 Conaglen, *supra* note 6 at 4. The quotation is from the prologue, which I assume was composed once Conaglen's analysis was completed, and therefore presumably represents a definitive summary of his thesis.

71 Flannigan, *supra* note 2 at 415-18.

72 It appears that Conaglen generally equates "non-fiduciary" duties with nominate duties of performance. Query the utility in defining all other duties as undifferentiated "non-fiduciary" duties.

73 Conaglen, *supra* note 6 at 232.

duties."[74] It will be appreciated that no core or clear purpose is disclosed in those terse assertions. It is not enough to declare that the protection is subsidiary (parallel) or prophylactic. The question remains: Protection against what? Prophylactic to what end? While Conaglen identifies opportunism as a targeted mischief (as one example), he does not identify with any clarity any other mischief. He leaves the nature of his protection undefined. He possibly is concerned either to avoid precisely replicating my analysis, or to leave wiggle room to allow his analysis to be adapted to other ends while reserving to himself (as author of the indeterminate construction) the theoretical authority to sort those ends.

A preliminary observation is that Conaglen rejects what he calls the syllogistic approach. His description of that approach, for which he provides no illustration, is that "if one can identify when a fiduciary relationship arises, that will indicate when fiduciary duties arise, which in turn will indicate why those duties have arisen and so identify what purpose is served by those fiduciary duties."[75] Conaglen asserts two difficulties with the approach: "First, the circumstances in which a fiduciary relationship arises – the major premise in the syllogism – are far from clear. Secondly, it is not clear that the syllogistic mode of analysis that has been described above accurately represents the manner in which fiduciary doctrine operates."[76] Neither objection, however, carries any freight. With respect to the first objection, prior to the modern confusion in the jurisprudence, judges had clearly and consistently articulated the animating policy. That policy necessarily identifies when fiduciary accountability arises. As for Conaglen's second objection, it carries no freight because he gives it no freight. He merely quotes, without elaboration, certain cryptic remarks of others that are of no evident relevance.[77]

Conaglen proposes an approach that he claims is different from the efforts of those who assay the jurisprudence for immanent principle. His project is "an attempt to identify the nature and function of fiduciary duties by reference to their content, rather than an attempt to provide a universal principle that might resolve the question of when fiduciary duties arise."[78] He explains why the project is "feasible":

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74 *Ibid.* at 235.

75 *Ibid.* at 7.

76 *Ibid.*

77 *Ibid.* at 9-10. I am not defending the "syllogistic" approach described (sparingly) by Conaglen, which I do not equate with conventional analysis. Rather, I object to the specific substance (or lack of substance) of each of Conaglen's objections.

78 *Ibid.* at 10.

> This approach is feasible because of the point made earlier – that certain classes of relationship are traditionally regarded as fiduciary in nature. In other words, it is clear that fiduciary duties are owed in such relationships. This permits analysis of the fiduciary obligations owed by persons in such relationships, without needing to develop a theory as to what factual circumstances might lead to such obligations being owed in other situations. One can analyse a concept based on a set of paradigm cases or instances of that concept, even if there is not universal agreement as to criteria of application of the concept. Thus, for example, one can focus on the fiduciary duties owed by solicitors, trustees, company directors and other recognized fiduciary actors, and analyse the nature and function of those fiduciary duties, without needing first to develop a principle that is capable of identifying all cases in which fiduciary duties apply. Once such analysis has been conducted, one can return to the question of when fiduciary duties may be owed.[79]

It is not obvious how Conaglen's approach differs in any substantive way from the "syllogistic" approach he finds inadequate. Both approaches involve mining the cases for principle or function. He seems only to be saying that he will confine his analysis to the content of status relations and not seek, at least initially, to generalize his analysis to fact-based accountability so as to produce a general test. His objective here seems simply to be to lower the expectations of his readers.

Citing Millett J.,[80] Conaglen describes his approach as involving an assessment of the cases to determine what duties are "peculiar to fiduciaries."[81] Only those peculiar duties are fiduciary duties:

> [I]f the description "fiduciary" is limited to those duties that are peculiar to fiduciaries there is a greater likelihood that a core purpose or function will be able to be identified among those duties. Such an approach allows one to analyse what is special about those peculiar duties, which in turn allows one to describe what function those duties perform which sets them apart from other duties and justifies their differentiation by application of the label "fiduciary."[82]

It should be evident that this approach lacks principle beyond the boundaries of the conventional accountability. Any exotic duty that a judge might choose to describe as a fiduciary duty will satisfy the "peculiarity" test simply because it is peculiar. The proper approach – the conventional approach – is to ask whether an arrangement involves limited access (the question of accountability), and then determine if the

79 *Ibid.* at 10-11.
80 See *Bristol and West Building Society v. Mothew*, [1998] Ch 1 at 16 (EWCA).
81 Conaglen, *supra* note 6 at 26.
82 *Ibid.* at 27.

opportunism concern is engaged by reason of an unauthorized conflict or benefit (the sequent question of liability).

Conaglen proceeds to examine a number of duties. He essentially dismisses, as I have elsewhere, the duties to perform the undertaking, exercise care, act in good faith, act for a proper purpose and act in the best interest of the beneficiary.[83] He concludes that two duties "clearly are peculiar to fiduciaries."[84] Those are the duty to avoid conflicts of interest and the duty to forgo unauthorized benefits. That conclusion, it will be apparent, mirrors the conventional position. The difference is that a conventional analysis produces that conclusion directly by recognizing the mischief of opportunism and the natural breadth of the policy decision to control that opportunism.

Is Conaglen only offering a circuitous justification for the conventional position? It seems not. That becomes apparent when we consider what he says it is "that marks peculiarly fiduciary duties out from other kinds of duties."[85] The peculiar conflict and benefit duties increase the likelihood that non-fiduciary duties will be properly performed. That, for Conaglen, is their function. Consequently, on his view, that is the function of fiduciary accountability:

> The key element that separates fiduciary duties from other duties not peculiar to fiduciaries is that fiduciary duties provide this enhanced likelihood of faithful adherence to duty by protecting the fiduciary from influences that are likely to interfere with proper performance of the fiduciary's non-fiduciary duties. The presence of such influences carries with it a risk that the fiduciary may be tempted not to perform properly his non-fiduciary duties. Removing the influences therefore increases the likelihood of a fiduciary performing his non-fiduciary duties faithfully. Thus, the concept of fiduciary "loyalty" encapsulates a subsidiary and prophylactic

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83 Robert Flannigan, "Fiduciary Duties of Shareholders and Directors" [2004] JBL 277 (SSRN: 628775) and Flannigan, *supra* note 1. For an illustration of the separate operation of the best interest duty, see *Buttle v. Saunders*, [1950] 2 All ER 193 (Ch). There were no evident unauthorized conflicts or benefits (no fiduciary breach), but the trustees would have breached their nominate duty to act in the best interest of their beneficiaries if they had not accepted the best price offered for the trust property.

84 Conaglen, *supra* note 6 at 39.

85 *Ibid.* at 59. See Richard Nolan, "Controlling Fiduciary Power" [2009] Camb LJ 293, for another view of what duties are "fiduciary" duties. Nolan concluded (at 315) that "obligations which invariably attach to a particular person because he has undertaken, or because the law requires him, to act for the benefit of another" include, in addition to "the conflicts rules … the requirements to exercise a power in good faith and for a proper purpose." Nolan, however, does not address the potential breadth of the latter two notions. See Flannigan, *supra* notes 7, 17, 83.

> form of protection for non-fiduciary duties which is designed to enhance the chance that those non-fiduciary duties will be properly performed.
>
> It is often observed that fiduciary doctrine is applied in a prophylactic manner, although frequently without much clarification of what that means. It is suggested that fiduciary doctrine is prophylactic in more than merely the strictness of its application. The argument advanced here is that fiduciary doctrine is prophylactic *in its very nature*, as it is designed to avert breaches of non-fiduciary duties by seeking to neutralise influences likely to sway the fiduciary away from properly performing those non-fiduciary duties.[86]

It again might be assumed that Conaglen is contemplating the opportunism mischief. Consider, however, that he never concludes that the exclusive concern is opportunism or self-dealing. His subsequent statements in fact maintain a distinct conceptual vagueness. He states, for example, that fiduciary duties "serve to protect the proper performance of non-fiduciary duties by seeking to prevent fiduciaries from acting in situations in which they face a temptation to breach their non-fiduciary duties."[87] A second example is that: "Fiduciary doctrine operates in a protective manner. It tries to avoid breach of non-fiduciary duties by seeking to remove incentives that may tempt a fiduciary not to perform his non-fiduciary duties properly."[88] Those are open-ended propositions that could accommodate temptations other than unauthorized conflicts or benefits (for example, temptations to exceed authority, entertain irrelevant considerations or delegate inappropriately, all in good faith). Another example is found in his discussion of the subsidiary character of the regulation: "Fiduciary duties are thus subsidiary duties, in the sense that they protect non-fiduciary duties …. Fiduciary duties assist with securing the proper performance of non-fiduciary duties by seeking to insulate fiduciaries against situations in which they might be swayed away from providing such proper performance."[89] All of these open-ended statements, and there are many, describe the function of fiduciary accountability at a policy level one rank removed from the conventional concern with opportunism. That will allow function to be refashioned indulgently. Instead of controlling opportunism, the indication from these statements is that the function is to *protect non-fiduciary duties* or to *deter breaches of non-fiduciary duties*. That proposed new generality leaves room for judges (or Conaglen) to redefine fiduciary regulation in fundamental ways without explicit policy justification. Once those kinds

86 *Ibid.* at 61-62.
87 *Ibid.* at 62.
88 *Ibid.*
89 *Ibid.* at 75-76.

of abstract statements find their way into judicial reasons as isolated propositions, there will be little conceptual impediment to passing over the conventional boundary to matters other than opportunism.

A final observation about Conaglen's understanding of function is in order. He expresses the "tentative" view that the doctrines of presumed undue influence and breach of confidence are not matters of fiduciary accountability because they are not "peculiar" to fiduciaries.[90] The difficulty here is that his view of the fiduciary jurisdiction is too narrow. He begins by asserting that the two doctrines "perform functions quite different from" fiduciary accountability.[91] With respect to presumed undue influence, he asserts that the function is to protect against "morally reprehensible" persuasion.[92] The "principle underlying undue influence is…the victimization of one party by the other."[93] It should be evident, however, that those sentiments do not represent a different function. Immoral persuasion and victimization are but expressions (again one rank removed) of the conventional concern with opportunism. Presumed undue influence is a fiduciary matter because the access acquired through influence exposes the individual to opportunism.[94] The argument that breach of confidence is not a matter of fiduciary accountability is equally untenable. Conaglen insists that the doctrine performs a "very different" function: "Whereas fiduciary doctrine is concerned with providing a subsidiary and prophylactic form of protection for non-fiduciary duties, obligations of confidence do not protect the proper performance of other obligations."[95] That is vacant analysis. A first observation is that the assumption of a confidence is by itself an assumption of limited access. One acquires access for a defined purpose. Even if that were the sole limited access dimension of an arrangement, it would still attract fiduciary accountability. Secondly, maintaining a confidence invariably *does* protect performance of connected undertakings or nominate duties. Thirdly, the ostensible formal independence of breach of confidence is a historical accident.[96] Fourthly, most judges do now properly accept that breach of confidence is a question of fiduciary accountability. Apart from those realities, Conaglen only further weakens his functional analysis by "tentatively" excluding presumed undue influence and breach of

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90 *Ibid.* at 236.

91 *Ibid.*

92 *Ibid.* at 239.

93 *Ibid.* at 240.

94 See Rick Bigwood, "From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom" in Jason Neyers, Richard Bronaugh and Stephen Pitel (eds.), *Exploring Contract Law* (Oxford: Hart, 2009) c. 15.

95 Conaglen, *supra* note 6 at 243.

96 See Flannigan, *supra* note 17.

confidence. Apparently his analysis cannot cleanly define, even for him, what is or is not a fiduciary matter. Ultimately his view of function requires both expansion (because it is too narrow in certain respects) and fencing (because it otherwise is open-ended).

The Finn Proposal

If function is properly understood, it should be a straightforward matter to identify who is subject to fiduciary accountability. But what test of accountability corresponds with Conaglen's open-ended approach to function? We now see why he objects to the limited access test. Limited access defines the boundary of our policy of controlling opportunism with relative precision. The scope of objectionable opportunism is congruent with the scope of limited access. Conaglen appears, by the intentional ambiguity of his analysis of function, to want to reserve an indeterminate degree of conceptual play for his version of fiduciary accountability. That presumably is why the reasonable expectation test appeals to him. He turns to that test towards the end of his analysis. I will address his views on reasonable expectation after briefly examining Finn's effort to splice reasonable expectation into the jurisprudence.

Reasonable expectation terminology has no historical foundation in the fiduciary context. The phrase played no part in the jurisprudence for virtually the whole of the judicial record. That alone suggests that its proponents may contemplate something beyond what was understood, and understood clearly, for centuries. Its introduction commonly is attributed to a 1988 presentation by Finn.[97] His commentary began with the speculation that common law countries were developing a three-tier regime of legal protection:

> One can … suggest that all [common law countries] have more or less explicitly evolved, or are in the process of evolving, a three-tiered hierarchy of standards of protective responsibility which are available, potentially, for the regulation of conduct in voluntary or consensual relationships. These, in ascending order of intensity, I will describe as "the unconscionability standard," "the good faith standard," and the "fiduciary standard." These labels, I should emphasize, are ones of convenience. Lest it be thought that there are clear lines of demarcation separating the three, it will later be indicated that they merely represent the dominant shades on a spectrum; that the points of transition are often indistinct though they are sometimes contrived – primarily

[97] Finn, *supra* note 5. Note that J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981) at 102, earlier had described a test of expectation on the part of a weaker party, concluding that it would be too broad unless qualified by a requirement that the stronger party, acting reasonably, knew of the expectation.

> for reasons of remedy; and that each, in what it exacts, shares characteristics with the others ….
>
> Common to all three standards mentioned is a concern with the extent to which one party to a relationship is obliged to acknowledge and to respect the interests of the other. But each, in setting its own limits, proceeds from a different premise. "Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith," while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other – to act selflessly and with undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much the most contentious of the trio is the second, "good faith." It often goes unacknowledged. It does embody characteristics to be found in the other two.[98]

I have addressed Finn's thesis elsewhere.[99] There are obvious difficulties with it. His own words both assert and deny his distinct tier proposition. And his subsequent brief descriptions of each of the three concepts fail to deliver any clarity or insight into their nature or the fact or relevance of their supposed tiered association.[100] He simply does not demonstrate that the three standards constitute an analytically relevant progression in the intensity of a singular "protective responsibility." Unconscionability actually has no discernible conceptual justification beyond the fact that it represses conduct that at a communal level cannot be digested or tolerated in some indefinite respect even though the conduct is not otherwise contrary to law. As for good faith, it is a phrase in crisis. On the one hand, it has long been used to describe the conduct required of a fiduciary, a use which originally was linguistically intuitive and raised no taxonomic concern.[101] On the other hand, over the past few decades its halo has been yoked to advance all sorts of unconnected agendas in multiple legal contexts. Conventional fiduciary accountability, including its conventional "good faith" articulation, does not suffer from a comparable conceptual vacuity or congestion.

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98 Finn, *ibid.* at 3-4.

99 See references *supra* note 47.

100 See Finn, *supra* note 5 at 6-26.

101 Flannigan, *supra* note 17. It now is a matter of concern, obviously, because new diverse understandings of the phrase may passively introduce further confusion into the fiduciary jurisprudence.

Nor is there any traction in the idea of a progression from selfish behaviour to selfless behaviour. As Finn himself describes them, both unconscionability and good faith cap or check self-interest, and therefore necessarily enforce a measure of selfless conduct. Parties are required to have regard for others to the extent that we limit their power or capacity to extract advantage. Fiduciary accountability may be understood in the same way. Actors assume and execute limited access undertakings for self-interested reasons (economic, social, reputational, spiritual or other considerations). For those reasons, they accept a default limit on their self-interest – they must eschew unauthorized conflicts or benefits.[102] At that level of abstraction the selfish/selfless analysis actually implies that the three standards, because they all constrain self-interest, are not conceptually distinct – and that obviously is not the case. Whatever distinctive meanings we might eventually assign to free-standing notions of unconscionability and good faith, they presently have no discernible utility in advancing our understanding of fiduciary accountability. On the contrary, if taken seriously, the indeterminacy of the claimed familial association manifestly would impair the clarity and sharp application of the conventional fiduciary discipline.[103]

Putting aside concerns with the tiered standards argument, consider Finn's introduction of his reasonable expectation thesis:

> Before considering this trio [the three tiers] separately, it is helpful initially to note without immediate elaboration what appears to be the core of the *method* to be employed in determining which standard of responsibility is to be operative in a given set of circumstances. This, it is suggested, can be expressed in three interlocking questions:
>
> (1) What are the nature, purpose and progress of the actual relationship between the parties particularly as manifest in their dealings *inter se*?
>
> (2) What, given the circumstances of the relationship, is the one party entitled reasonably to expect (generally or in particular circumstances) of the other in or in virtue of the relationship: that he will act in his own interests; that he will have regard to the former's interests; or that he will act in the former's interests?

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102 Flannigan, *supra* note 2 at 378-83.

103 In opposition to Finn's view (*supra* note 5 at 55), fiduciary accountability *is* "something separate, complete and whole," and *it does not belong*, in any useful sense, "to a family of doctrines … informed by a common principle. Fiduciary accountability includes the law of confidence and presumed undue influence, the opportunism (including bias) elements of ethics or ethical regulation and various other status elements.

> (3) Are there any independent reasons in public policy which, of themselves, call for the regulation of the conduct of the one party, or which would justify according a significant primacy to the expectations of the other?
>
> The one matter that warrants present emphasis is that reasonable expectations – an amalgam of actual expectations and judicial prescription – are a potent factor in the identification of the standard appropriate to a given situation.[104]

Finn's second question, where reasonable expectation first appears, suffers from the same deficient appeal to a selfish/selfless continuum. Fiduciaries are *always* acting in what they believe to be their direct or vicarious self-interest. They *choose* to accept or assume arrangements that come with a default requirement that they forgo any conflict or benefit touching the undertaking. They conclude, if they actually consider their legal position *ex ante*, that it is in their interest to suppress their immediate personal interest to advance the interest of another. What matters in that calculation, and also where that calculation is absent, is that they acquire access to the assets of the other in the course of pursuing their self-interested other-regarding undertaking. Where that happens, *we* impose the default proscription on unauthorized self-regard.

Finn next formed his thinking into what essentially is a confirmation of the conventional position. Under the heading "A Unifying Purpose?" he offered this assessment:

> The kinship of and the graduated progression of unconscionability, good faith and the fiduciary principle are reflected in their common concern with two questions. To what extent should one party's ability to pursue his own ends be circumscribed because of the circumstances of his relationship with another? To what extent should that other's interests be protected because of that relationship? Each doctrine, given its own imperatives, necessarily provides different answers. And at least with unconscionabiltiy and good faith the two questions are, most likely, merely different formulations of a single question – a question concerned simply with the mediation between the *several* interests of the parties to a relationship. This last cannot be said of the fiduciary principle. Its function is not to mediate between interests. It is to secure the paramountcy of *one side's* interests or in some instances, as with partnerships, of a joint interest. And it does this, in the writer's view, by accentuating the first over the second of the above questions. The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests ….
> In this the true nature of the fiduciary principle is revealed. It originates, self-evidently, in public policy: in a view of desired social behaviour for the end this achieves. To maintain the integrity and the utility of those relationships in which the

104 Finn, *supra* note 5 at 4-6.

> (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service. The fiduciary is not to use his position or the power or opportunity it gives him to serve an interest other than his beneficiary's, be this his own or a third party's. Translated into legal doctrine this has produced two, overlapping proscriptions:
>
> A fiduciary –
>
> (a) cannot use his position to his own or to a third party's possible advantage; or
>
> (b) cannot, in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party
>
> unless this is freely and informedly consented to by his beneficiary or is authorised by law. Two themes, it may be noted, are embodied in this: the one concerns itself with misuse of the fiduciary position: the other with conflicts of duty and interest or conflicts of duty and duty arising in or in virtue of that position.[105]

It should be apparent that Finn produced this conventional result (the conflict and profit prohibitions) without any conceptual reliance on his tiered standards proposition. Instead he explicitly confirmed that fiduciary accountability is different in kind from both unconscionability and non-fiduciary notions of good faith, and is visibly the expression of our policy decision to control production opportunism.

Finn, however, did not conclude his analysis with that conventional summation. He stated that "[e]ven if one accepts the limitation of the fiduciary principle to the modest role of exacting loyalty, a large issue still remains. What is it in a relationship that marks the transition from unconscionability and good faith on the one hand to the fiduciary principle on the other?"[106] Later in his discussion he asked "[when are parties] so circumstanced that one is reasonably entitled to expect that the other is acting or will act in his interests."[107] His answer begged the question:

> What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendency, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or

105 *Ibid.* at 27.

106 *Ibid.* at 31.

107 *Ibid.* at 46.

> advancement of that other's interests that foundation exists for the "fiduciary expectation."[108]

There is nothing here that advances the determination of *who* is subject to fiduciary accountability. What is it that will "so implicate" or "so align" a party?

Finn eventually conceded his inability to give concrete definition to fiduciary accountability:

> First, does all of this bring us any closer to an unexceptionable definition of a fiduciary? The answer must be no …. All that the writer would venture is this: a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest.[109]

It is not uncommon in modern cases to find descriptions of fiduciary accountability comparable to that expressed by Finn. The deeper substance of such statements is that we have conceived fiduciary accountability to control the opportunism that is latent in limited access arrangements. Finn certainly accepts that functional baseline. It is not clear, however, what other functions he may contemplate.[110] A test of reasonable expectation potentially recasts the function of the jurisdiction. It is conceptually open-ended and could accommodate divergent functions. That conceptual promiscuity renders reasonable expectation unsuitable as a test for fiduciary accountability.

The Conaglen Defence

Finn's reasonable expectation terminology subsequently found a measure of acceptance in certain jurisdictions.[111] Predictably, however, given that his own analysis was thin, and largely conventional in its fiduciary aspects, no dominating insight was associated with his construction. Some regarded reasonable expectation as an organizing principle for a basket of equivocal factors. Elsewhere it was regarded as but one of several tests competing for recognition. In many cases, it

108 *Ibid.* at 46-47.

109 *Ibid.* at 54.

110 See Finn's coeval analyses: "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76; "Fiduciary Law and the Modern Commercial World" in Ewan McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford: Clarendon Press: 1992) c. 1.

111 See especially *Hodgkinson v. Simms*, [1994] 3 SCR 377. Then compare *Galambos v. Perez*, [2009] 3 SCR 247. See Flannigan, *supra* note 48.

made no appearance. The practical effect of its introduction was to further confuse, rather than clarify, the jurisprudence.[112] Its intelligibility remained undemonstrated.[113] Now Conaglen has volunteered his view of that intelligibility.[114]

It frequently is observed that identifying the function of a regulation necessarily identifies its borders. Conaglen seemingly rejects that logic. His own model, as he sees it, is not up to the task:

> The view that fiduciary doctrine offers a subsidiary and prophylactic form of protection for non-fiduciary duties clarifies what the various principles of fiduciary doctrine are concerned to achieve, which is important in considering whether it is appropriate for fiduciary doctrine to apply. The view that fiduciary duties are protective of other non-fiduciary duties indicates the need for non-fiduciary duties to exist in order that fiduciary doctrine can serve its protective function vis-à-vis those non-fiduciary duties. However, beyond that, the protective thesis does not itself identify when it is or is not appropriate for non-fiduciary duties to be protected in this way.[115]

That final sentence of conceptual surrender is inexplicable given that Conaglen purports to know "what the various principles of fiduciary doctrine are concerned to achieve."

Before beginning his defence of reasonable expectation, Conaglen referenced two propositions that occasionally appear in modern decisions: "The courts themselves have acknowledged that no one theory or definition of the fiduciary concept has met with wide judicial

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112 Edelman, *supra* note 2 at 317-18, believes the reasonable expectation approach confirms his "voluntary undertaking" thesis. On contractual conceptions of fiduciary accountability, see Flannigan, *supra* note 15 at 415-22 and *supra* note 66 at 45. See also Robert Flannigan, "The Political Imposture of Passive Capital" (2009) 9 JCLS 139 (SSRN: 1362154).

113 Consider that Finn accepts (as does Conaglen) the strict character of fiduciary accountability. That feature of conventional accountability conflicts with the idea of a "reasonable" expectation. See generally Robert Flannigan, "The Strict Character of Fiduciary Liability" [2006] NZ L Rev 209 (SSRN: 940659).

114 Recall that Conaglen decided to not initially define *who* is subject to fiduciary accountability. Only at the end of his analysis does he investigate that question. See Conaglen, *supra* note 6 at 245 ("This book has sought to address the nature and function of fiduciary doctrine. It has developed and considered the consequences of an analysis of what fiduciary duties do when they exist, rather than focusing on the question of when fiduciary duties exist. It is now necessary to address the question of when fiduciary duties arise.").

115 *Ibid*.

consensus and indeed have said that it would be undesirable for them to attempt to provide such a definition."[116] Both propositions are seriously deficient. Consider the assertion that judges have not reached a consensus on any of the novel formulations of accountability proposed over the past three decades. That is because most judges already share an intuitive consensus as to the conventional purpose of the regulation, and the modern formulations do not accord unambiguously with that long-standing consensus. The conventional consensus is that a limited access undertaking must not be compromised by the self-regarding impulse. That fundamental policy or social norm is not faithfully reflected in the proposed general tests, for example, vulnerability, power-dependency or reasonable expectation. Those tests leave room for very different ideas. The conventional ethic is deeply ingrained in the judicial mind, and that is manifested in the reluctance to adopt conceptions of indeterminate substance. That, unfortunately, has had a perverse effect. When judges decline to coalesce around modern proposals, there arises in the mind of the uninformed observer the suspicion that there is widespread judicial uncertainty as to the core nature of the jurisdiction. That leads to further proposals, and to a great deal of diversity [read confusion] in the literature. Some judges may then choose to adopt particular formulations. Others may attempt to marry or combine multiple formulations into seemingly defensible statements of the law that allow them to do what they did conventionally – control opportunism in limited access arrangements. A few judges will simply get it all quite wrong. Over time the jurisprudence must suffer. The essential simplicity of the conventional accountability will be obscured. Function will be distorted. The control of opportunism will be diminished.

The second proposition, that it is undesirable to define fiduciary accountability, is both senseless and dangerous. The proposition fails at every level. Consider first that the conventional function of controlling production opportunism has been closely defined for centuries. That, for virtually all observers, has been a "desirable" exercise in definition. The jurisdiction has only recently appeared to lack definition because of the veneer of confusion introduced by the inattentive analyses and inventions of a few. Secondly, because of that confusion, massive effort now is expended by lawyers, judges and commentators in attempts to understand the nature and scope of the regulation and to communicate that understanding to others. There plainly is a *need* for definition – to illuminate and affirm the animating function and thereby disperse the confusion. Thirdly, fiduciary accountability is strict. A strict liability should apply only where actors are able to, or have the opportunity to,

116 *Ibid.* at 254.

identify the parameters of what is objectionable conduct. Strict liability must be *transparent*. The conventional accountability is transparent. Those with limited access cannot entertain conflicts or benefits that are not authorized by the relevant party. No net social gain is achieved by replacing that transparent accountability with an amorphous or ad hoc accountability. Fourthly, apart from the specific concern with strict liability, there is a general duty on judges to justify their conclusions. It is not good enough to "feel" that fiduciary discipline is appropriate in given circumstances. Lastly, even if they deny it, judges do by the content of their judgments necessarily *define* fiduciary accountability. It is preferable that such de facto definition be explicitly reasoned.

Conaglen began his defence with a summary description of Finn's approach: "This approach adopts the idea of acting for and on behalf of another but develops it by indicating that the court must determine whether it is legitimate to expect that the actor will put aside his own interests and act solely in the interests of the other party."[117] Observe that Conaglen substitutes "legitimate" for "reasonable." That requires attention. At least two interpretations are in play.[118] One is that the issue of reasonable expectation involves the court in determining whether an access was acquired for a defined purpose. The other interpretation is that the question involves a determination by the court of whether an ascertainable expectation is "reasonable" given the circumstances of the parties. That interpretation, a form of merit or fairness review, has no conventional foundation. Arguably both "reasonable" and "legitimate" can with some intellectual dexterity be employed to advance either interpretation. It is that conceptual generality or capaciousness that makes either term a deficient descriptor for fiduciary accountability. The immediate point, however, is that the "legitimate" descriptor is far more likely, for most judges, to imply the second interpretation. The difference is illustrated by Deborah DeMott's separate view, quoted by Conaglen, that the test of accountability is "justifiable" expectation, and that such a test is "related to, but not identical to, assessing whether [expectations] are reasonable."[119] Conaglen concluded that DeMott's formulation was "but a minor modification of Finn's analysis, if indeed it is any modification at all."[120] Whether Finn or

117 *Ibid.* at 250.

118 Flannigan, *supra* note 1 at 73-75 and *supra* note 2 at 418-19.

119 Conaglen, *supra* note 6 at 250. See also Flannigan, *supra* note 2 at 419-23.

120 Conaglen, *ibid*. Conaglen regards the ostensible difference between Finn and DeMott as relating to the *imposition* of fiduciary accountability (by expectation or by law). That is not the issue. Rather, the concern is that novel and multiple interpretations are accommodated by indefinite descriptors (reasonable, legitimate, justifiable).

DeMott would agree that the difference is minor, Conaglen is here implicitly supporting the second (unjustified) interpretation.[121]

Conaglen continued his analysis with the briefest survey of the judicial reception of reasonable expectation. He concluded that the few cases he examined were all "consistent with" Finn's "legitimate" expectation test.[122] He strengthened that view in his next paragraph, now concluding that there was "*considerable support* within the case law for the view most closely associated with Finn … that fiduciary duties arise when it is legitimate to expect that the fiduciary will 'act for and on behalf of' the other party to the relationship – 'in the interests' of that party – and will do so to the exclusion of his own interest."[123] However, while there may be a degree of support attributable to a judicial desire for guidance or power, there has been no principled further development or justification of the expectation test by the judiciary.

Conaglen then makes a striking concession. He regards legitimate expectation as a deficient test:

> The difficulty with the legitimate expectations approach is that it is not particularly illuminating in practical terms. It works well as a theory, but in large measure that is because it operates at such a high level of abstraction: in effect, the legitimate expectations approach states little more than that fiduciary duties arise whenever it is appropriate for them to apply. The issue that remains is how to determine whether an expectation of fiduciary duties is legitimate in the circumstances.[124]

The reality is that legitimate expectation does *not* work well even "as a theory" for the very reason given by Conaglen. Its "high level of abstraction" (its capacious vagueness) leaves it open to indefinite interpretation. That is a lethal weakness. Content must be added (and circumscribed) to give it analytical traction. That content then becomes the test. The legitimate expectation construction described by Conaglen only restates the question. When is fiduciary accountability appropriate? When is an expectation legitimate?

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121 Consider that Conaglen (*ibid.*) ends this part of his analysis with an explicit denial that legitimate expectation per se has analytical cut: "Finn's focus on legitimate expectations of loyalty is only a subtle shift from Shepherd's argument that fiduciary duties exist when power has been granted subject to fiduciary controls. The question remains: when is it reasonable to expect that a person will put aside his own interest and act solely in the interests of the other party?"

122 *Ibid.* at 259.

123 *Ibid.* at 260 [emphasis added].

124 *Ibid.*

Nevertheless, in what appears to be a curious allegiance to Finn, Conaglen gives grudging approval to the notion:

> The cases discussed above show that the judiciary consider it to be a helpful description of when fiduciary duties arise, so that it cannot simply be rejected out of hand. Indeed, the courts' repeated refusals to define or describe the fiduciary concept, and their insistence on retaining flexibility as to when fiduciary duties arise, tend to mean that the legitimate expectations approach is the only one likely to be accurate, in that any attempt at a more restrictive definition or description is highly unlikely to match the cases. The legitimate expectations approach may not be the most intellectually satisfying conclusion, but it seems likely to be the most accurate reflection of the case law.[125]

There obviously is a fundamental difficulty with the argument that "a more restrictive definition or description is highly unlikely to match the cases." Conaglen appears to be saying that a proper description must accommodate every case, whether or not correctly reasoned or decided. That is to abandon juridical deliberation. The relevant question is to ask whether a proffered definition accurately reflects the accepted *function* of the jurisdiction. That is to be assessed on the basis of the statements of function in the recognized foundational authorities, and on whether particular cases properly comprehend that function.

The theme of diffident support with heavy qualification permeates Conaglen's analysis. He apparently cannot commit earnestly to legitimate expectation. Another example of his muted advocacy is his statement that "the difficulties inherent in applying any standard that is based on the 'reasonableness' or 'legitimacy' of expectations are not necessarily fatal to the theory."[126] He later added that "it is still plausible for the courts to adopt such an approach, as the cases themselves show."[127] That sort of commendation does not inspire confidence that he actually believes the test is a principled one. An attempt to rehabilitate a deficient notion may at some point become an interment.

Conaglen endeavored to "enumerate some of the considerations that can assist in determining whether the fiduciary expectation is legitimate in the circumstances."[128] His view is that "a number of related points can be made that are not so much criteria for determining whether expectations

125 *Ibid.* at 260-61.

126 *Ibid.* at 261.

127 *Ibid*. He seems to be saying that it is "plausible" to adopt the approach because some courts do so. Or that because some do, there must be something plausible about it.

128 *Ibid*.

are legitimate as they are modes of analysis that can be brought to bear in approaching that question."[129] His first pronouncement, however, was to deny that his own approach would have any significant role in that exercise:

> Understanding that fiduciary doctrine provides subsidiary and prophylactic protection for non-fiduciary duties clarifies what the various fiduciary principles are concerned to achieve. However, that does not assist greatly in determining whether it is legitimate for one party in a relationship to expect that the other will meet the obligations that those principles impose.[130]

Again he seeks to reduce the expectations his readers might have formed about his ability to produce a transparent test of accountability grounded in specific function.

An expectation is legitimate, according to Conaglen, if it corresponds with "pre-existing patterns of judicial behaviour as to the application of those obligations."[131] That is his explanation of status accountability. He then concludes that those pre-existing patterns can inform fact-based accountability by analogical reasoning – his first mode of analysis. As I indicated earlier,[132] analogy may mislead, and it is entirely unnecessary where function is transparent. The jurisprudence dealing with the conventional status categories establishes the function of the jurisdiction. The status categories, however, do not exhaust the scope of that function. Other relations may involve only a situational limited access. The mischief and the regulation nevertheless remain identical to the extent of the access. Consequently, while seemingly useful, analogical reasoning is problematic unless confined to tracking the opportunism mischief.

Conaglen's second "mode of analysis" is to recognize "that there is societal value in protecting the integrity of the performance of obligations in that relationship and others of its kind."[133] He adds that the "institutions themselves have societal importance and are therefore deserving of added protection, beyond that provided by other legal mechanisms."[134] He offers the example of a mechanic.[135] His view is

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129 *Ibid.*

130 *Ibid.*

131 *Ibid.* at 262.

132 *Supra*, text at notes 7-11. See also Flannigan, *supra* note 1 at 48.

133 Conaglen, *supra* note 6 at 263.

134 *Ibid.*

135 See Finn, *supra* note 5 at 40, for his view of the "automobile servicer."

that mechanics are not fiduciaries because "their work is not considered of sufficient societal importance to engender the specially protective rules that attend a fiduciary relationship."[136] I have addressed the position of the mechanic in depth elsewhere.[137] Conaglen, like Leonard Rotman[138] and Richard Nolan,[139] refuses to accept the natural scope of fiduciary accountability. This is another instance where Conaglen's view of accountability, rather than being open-ended, is too narrow.[140] There is no "mode of analysis" here. There is just unjustified social stratification. In the present context, protecting the integrity of relations means controlling opportunism in every limited access arrangement.

The third "related" mode of analysis is "to ask from an external perspective whether it was reasonable to expect the person … to use the legal mechanisms already at their disposal, particularly in the form of the law of contract, to try to control the risks that fiduciary doctrine would address."[141] That self-help argument is neither new nor justified by authority.[142] It does illustrate, however, how almost any argument becomes relevant if the test is the reasonableness of an expectation. Conventional fiduciary accountability is not displaced because a beneficiary might have some capacity ex ante to address the prospect of opportunism. Self-help certainly is not a consideration for the status classes and it is not obvious why it should matter for fact-based accountability. Conaglen again appeals to the mechanic example, but offers nothing beyond Nolan's flawed analysis.[143] He then asserts that self-help "is *one* of the considerations that help to determine whether a fiduciary expectation was legitimate in all the circumstances."[144] That still comprehends a narrowing of the conventional accountability. Even where a relation is one of limited

136 Conaglen, *supra* note 6 at 264. Consider that agents and employees are subject to default fiduciary accountability. Is their work of sufficient societal importance? See Flannigan, *supra* note 17 at 287-89. See also Robert Flannigan, "The Fiduciary Accountability of Ordinary Employees" (2007) 13 CLELJ 283.

137 Flannigan, *supra* note 66.

138 Leonard Rotman, *Fiduciary Law* (Toronto: Thomson Carswell, 2005) at 252-53.

139 Richard Nolan, "The Legal Control of Directors' Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report" (2005) 6 Theor Inq L 413 at 422-23, reprinted in John Armour and Joseph McCahery (eds.), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the U.S.* (Oxford: Hart, 2006) c. 11.

140 As it is with respect to undue influence and breach of confidence, *supra*, text at notes 90-96.

141 Conaglen, *supra* note 6 at 265.

142 See Flannigan, *supra* note 2 at 410-11.

143 Conaglen, *supra* note 6 at 265. See Flannigan, *supra* note 66.

144 *Ibid.* at 266.

access, Conaglen would deny fiduciary discipline in some indefinite circumstances. He believes he will know when it is "legitimate" to deprive limited access beneficiaries of their right to call their fiduciaries to account. That is contrary to the conventional principle that, given the detection and evidentiary concerns, judges do not assess whether unauthorized conflicts or benefits are justified or excusable.

A "final facet" described by Conaglen is "the appropriateness or legitimacy of finding fiduciary duties to have been owed between commercial actors."[145] He suggests that there is a substantive debate on the issue (there isn't), and argues that legitimate expectation "provides a means of reconciling these apparently inconsistent perspectives."[146] He immediately recognizes, however, that there is a problem:

> This can create come uncertainty as to the applicability of fiduciary duties in a given relationship, which is always undesirable in commercial transactions. However, this is a consequence of the application of the legitimate expectations standard, as opposed to a clear rule, which itself is a consequence of the courts' refusal to allow the fiduciary concept to be hamstrung by a formal definition. Furthermore, the degree of uncertainty that the legitimate expectations standard produces should not be exaggerated. Fiduciary doctrine is not regularly applied in commercial settings outside of the settled categories of fiduciary relationships, where the fiduciary actors are (or at least should be) well aware of the fiduciary obligations that attend their positions. When it is applied outside of those settled categories, it responds to the legitimate expectations of the parties.[147]

These remarks further reveal considerable ambivalence on Conaglen's part about the utility of legitimate expectation. He concedes that the approach creates uncertainty. He then says the judges accept (even cultivate) that uncertainty because they do not want to be "hamstrung by a formal definition." That is to subscribe both to uncertainty and to capricious judicial power. It is difficult to understand, particularly in a commercial context, how anyone could assert that judges should not be guided by definition. It is not the role of judges to be free agents. Their role is to know the function of the law and to see that function realized.

There also is empirical vacancy in Conaglen's assertion that "fiduciary doctrine is not regularly applied in commercial categories outside of the settled categories of fiduciary relationships." How does he know that? No cases are offered as illustrations. It must be obvious that

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145 *Ibid*.

146 *Ibid.* at 267.

147 *Ibid.* at 267-68.

the "settled categories" (partners, directors, officers, agents, employees, trustees, solicitors) make up the bulk of all commercial relations. Further, many interactions between otherwise independent businesses involve situational limited access (holding revenues, deposits or fees, sharing confidential information). Secondly, how does he know that the commercial application of fiduciary accountability outside of the settled categories "responds to the legitimate expectations of the parties"? He does not develop the point.

It is not evident how Conaglen's modes of analysis usefully inform the notion of legitimate expectation. Actors do not regularly form expectations about their "fiduciary" accountability by analogizing their positions to established fiduciary relations. They are just as likely to assume their position is different because they are not formally identified as occupying a status fiduciary position. If they do explicitly consider their "fiduciary" accountability (for opportunism), they presumably take their expectation from the general lay sensibility or social norm that unauthorized self-regard is not appropriate where one assumes a purpose-specific undertaking for the benefit of another. Of course, as most analysts understand, the revealed private subjective intentions of actors (their beliefs) as to their legal status or accountability are irrelevant. The relevant intention in the fiduciary context is whether an actor intended to assume a physical arrangement that involved acquiring access to the assets of another in the course of a limited access undertaking. If that circumstance arises, the community imposes *legal* expectations. In that respect there is a disjunction between analogy and expectation. As for the significance of the societal importance of an undertaking, it must be obvious that it is the importance of the *function* of the regulation that carries the day. If we are committed to controlling opportunism in limited access arrangements, it should not matter whether the actors involved are engaged in undertakings that some might regard as socially less important. Fiduciary regulation was designed to control opportunism generally, not selectively manage the opportunism of actors who fit within an indeterminate class of socially important undertakings. No immunity from fiduciary accountability arises by reason of social or economic status. That is the conventional discipline imposed by the community. It does not depend on whether an individual has a "reasonable" expectation. So again there is a disconnect. And so it is with the self-help and commercial parties arguments. Those "modes" or "facets" of accountability (that is, the *irrelevance* of those arguments) are features of a judicially imposed regulation (a judicial or societal expectation). Individual subjective expectations that are based on the default character or content of the law are irrelevant because the communal expectation already exists and applies as a matter of law. Individual expectations that are inconsistent with the imposed regulation are irrelevant for that very inconsistency, unless there is a proper variation of accountability by the appropriate parties.

Conaglen ends this part of his analysis with what must be considered a heroic conclusion: "Thus, all things considered, the cases can be seen to support the view, advanced most comprehensively by Paul Finn, that there is no clear rule as to when fiduciary duties arise but rather that they respond to a standard of legitimate expectation."[148] For Conaglen, despite his firm views as to function, there is no "clear rule," not even legitimate expectation. Instead, on his analysis, the different modes of analysis "all reflect alternative but related facets of the question whether the fiduciary expectation is legitimate in the circumstances."[149] There is no promise in that. He does not specify a substantive connection between function and accountability. That is a profound deficiency. Even though Conaglen accepts that *one* function is to control production opportunism, his legitimate expectation test does not naturally conform even to that function. It requires considerable conceptual fencing before it will distinguish those who potentially might compromise their access. Moreover, as discussed above, Conaglen appears to contemplate mischiefs other than opportunism, although he does not identify any. Without that it is impossible to determine if the legitimate expectation test would properly identify who is accountable in a *fiduciary* way for the purposes of those other mischiefs. The unavoidable reality is that reasonable (legitimate, justifiable) expectation is so pregnant with meaning that, unless cabined as limited access, it will reconfigure fiduciary accountability in unpredictable ways. Until an alternative policy analysis is recognized as authoritative, the jurisdiction must remain focused on controlling the infection of opportunism. If there are additional functions that others believe require installation as *strict* fiduciary regulation, those functions must be clearly identified and substantively justified.

Notwithstanding his own considerable reservations, Conaglen's final remarks regarding legitimate expectation imply that it is the answer to the admitted weakness of his broader thesis:

> Fiduciary doctrine provides a subsidiary and prophylactic form of protection for non-fiduciary duties. That, however, does not answer every possible question about the law relating to fiduciaries. For example, it does not provide an unambiguous answer to the problematic question of when fiduciary duties arise. The content and purpose of fiduciary doctrine are important in thinking about when such regulation might be

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148 *Ibid.* at 268.

149 *Ibid.*

> appropriate but are not themselves determinative of that question. The most compelling answer that can be gleaned from the cases is that fiduciary duties arise when it is legitimate to expect the abnegation of self-interest upon which fiduciary doctrine insists.[150]

That is not a "compelling" answer. Rather, it is an invitation to fabricate ex ante or ex post an argument that will appeal to the "morality" that Conaglen purports to dismiss.

Conclusion

Limited access properly defines fiduciary accountability because it is congruent with the scope of the opportunism mischief. Reasonable expectation, in contrast, is an invention that is not leashed to opportunism. It is not tied per se to any function. It must be given content. That assigned content then becomes the actual test of accountability. Thus, to say that there must be a reasonable expectation that one will act in the interest of another is to make that content the test. Yet even that is incomplete. In what sense or respect must one act in the interest of another? The conventional answer is that one must not take unauthorized advantage of the access associated with the undertaking. That content then is the test – the test of limited access. Conaglen does not reach that conclusion because his conception of function is not fully developed, or because he intends to leave function open-ended to accommodate whatever functions he might be inclined to label as fiduciary functions. In either case, his is a deficient analysis. Specifically, he failed in his effort to depreciate limited access. He then failed in his effort to elevate reasonable expectation, and not simply because he does not have much of an appetite for the notion. Reasonable expectation lacks definition both in terms of the "modes of analysis" that Conaglen proposes and the numerous criteria that others have enlisted in their attempts to give it content (ascendency, influence, vulnerability, trust, confidence, dependence, power, reliance). Reasonable expectation does not get the regulation right unless its content is restricted to the function of controlling opportunism. Fiduciary accountability, it must be understood, is *our* imposition on limited access undertakings – a default constraint on opportunistic impulses – a *social* expectation.

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[150] *Ibid.* at 275-76. Observe that Conaglen here might again be taken to accept the conventional view ("the abnegation of self-interest"). Given his preceding analysis, his likely meaning is that the control of opportunism is (to him) the only *clear* circumstance where fiduciary accountability is imposed.