The State's Fiduciary Duty to the Stolen Children

Paul Batley[1]

Introduction

Within a few hours of her birth in September 1942 Joy Williams was removed from her mother, an unmarried Aboriginal woman aged eighteen, by the Aborigines Welfare Board (the Board). Joy Williams is one of the "stolen generations" of Aboriginal children removed from their families and communities by Aborigines protection boards throughout Australia until the late 1960s. It has been estimated that more than 5,600 children were removed in New South Wales between about 1890 and 1969.[2]

In 1993 Ms Williams sought to commence proceedings for compensation against the Minister, *Aboriginal Land Rights Act*, 1983,[3] and the State of New South Wales. This was the first action brought by an Aboriginal Australian for a remedy for losses suffered as a result of the assimilationist removal policies. The author is not aware of any similar proceedings in New Zealand, Canada or the United States, the other common law countries with indigenous minority populations. Since Ms Williams began her case, another action has been commenced[4] and an inquiry announced.[5]

This article will outline the history of Ms Williams' claim and give detailed consideration to one of the causes of action it relies upon, breach of fiduciary duty.

Williams v Minister, Aboriginal Land Rights Act 1983

Ms Williams commenced proceedings in the Supreme Court of New South Wales in January 1993 claiming damages for negligence, wrongful imprisonment and breach

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2 Read P *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1813 to 1969* (NSW Ministry of Aboriginal Affairs, Sydney, 1981), p 9. See also Gungil Jindibah Centre of Southern Cross University, *Learning from the Past* (New South Wales Department of Community Services, Sydney 1995) and Sweeney D "Aboriginal Child Welfare: Thanks for the Apology, But What About Real Change?" (1995) 3 (76) *Aboriginal Law Bulletin* 4.

3 The legal successor of the Aborigines Welfare Board.

4 In April 1995 six Aboriginal plaintiffs commenced proceedings against the Commonwealth of Australia in the High Court of Australia in its original jurisdiction. Five of the plaintiffs were removed from their families by an officer of the Commonwealth under the *Aboriginals Ordinance* 1918 (Northern Territory) between 1927 and 1949. The sixth plaintiff is the mother of a child removed from her under the *Aboriginals Ordinance* in 1946. The claim seeks a declaration that the *Aboriginals Ordinance* was invalid as contrary to a number of alleged implied constitutional doctrines, including equality before and equal protection under the law and freedom of movement and association. See (1995) 3 (73) *Aboriginal Law Bulletin* 25.

5 In August 1995 the Human Rights and Equal Opportunity Commission commenced an inquiry into the separation of Aboriginal and Torres Strait Islander children from their families. See (1995) 3 (74) *Aboriginal Law Bulletin* 3 and (1995) 3 (75) *Aboriginal Law Bulletin* 2.

of fiduciary duty. As a preliminary step, she applied under the *Limitation Act* 1969 for an order extending the time within which she could commence proceedings. Evidence was given to the Court about Ms Williams' experience of removal and its consequences.

Within a very short time of her separation from her mother in 1942, Joy Williams was placed at Bomaderry Children's Home, an institution for infant Aboriginal children operated by the United Aborigines Mission.

In 1947 Bomaderry was overcrowded. The United Aborigines Mission told the Board that if the strain were not lessened, the home might have to close down. They suggested that Joy Williams, "a white child", be removed to "a Home for white children at Wentworth Falls." In April 1947, she was admitted to Lutanda Children's Home at Wentworth Falls in the Blue Mountains, an orphanage under the control of the Plymouth Brethren. The reason for her admission to Lutanda was stated to be "[t]o take the child from association of Aborigines as she is a fair skinned child."

At Lutanda, Joy had no contact with her mother. She believed that she was an orphan and, like the other children, "white". Unlike the other children, she had no visitors and no relatives to stay with at Christmas. She was lonely in the home. She went to the local primary school and later the local High School.

Discipline in the Home was strict. Punishment included writing out the words "God is love" many times. She was also physically chastised by being beaten on the back of the legs with a butter pat. On one occasion a staff member threw her against a wall and she suffered a fractured collarbone and wrist. She ran away from Lutanda several times.

After one absconding, she was told that she would end up in the gutter, that she had mud in her veins and that her mother was an Aboriginal and a drunk. Until then, Joy had not known that she had a mother. It was also then that she first learned that she was Aboriginal. She was growing up in a community with a low opinion of Aboriginals and the discovery was shocking. She cut her veins to look for the "mud".

Joy was formally discharged from Lutanda in 1960, the year of her eighteenth birthday. For the next few years she was often homeless and vagrant. She consumed alcohol and drugs, was involved in crime and served a term of imprisonment. She spent several periods in psychiatric hospitals between 1962 and 1965. She had a daughter who was taken from her and adopted. She later had another daughter and a son who remained with her.

Joy Williams has been diagnosed as having a severe psychiatric disorder called "borderline personality disorder". "It is extremely unusual if not unkown [to develop] in the absence of lack of caring parenting."[6]

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6 Report of Professor Brent Waters quoted in *Williams v Minister Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of NSW, Studdert J, 25 August 1993) at 9.

Ms Williams began her claim after she learned that she had a recognised psychiatric illness that was connected with her removal from her mother and her upbringing as a ward of the Aborigines Welfare Board. Ms Williams needed the leave of the Court to commence proceedings because, although the time for bringing her claim was postponed while she was a minor, her cause of action became statute barred six years after her 21st birthday. The questions examined by the Court were:

1. was Ms Williams unaware of the fact, nature or cause of her injury at the time the limitation period expired? and, if so,

2. was it "just and reasonable" to extend the time limit?[7]

Studdert J found that Ms Williams did not know that she had a serious psychiatric condition which was connected with her removal from her mother and her upbringing at Lutanda until she was told about the 1991 psychiatric report in which she was diagnosed as having "borderline personality disorder". However, Studdert J found for two reasons that it was "neither just nor reasonable" to extend the time limit.[8]

First, he was not satisfied that there was evidence available to Ms Williams to establish the causes of action she pleaded. Studdert J found that " [h]owever unattractive and erroneous" the decisions of the Aborigines Welfare Board may now appear, the onus was on Ms Williams to show that the Board or its employees or agents were negligent with reference to the "standards and state of knowledge " of the 1940s.[9] His Honour made reference to the avowedly assimilationist policies of the Board as expressed, for example, in its annual report in 1947:

> . . . one of the principal features of the Board's policy is the assimilation of the better class of aborigines, particularly those of lighter caste, into the general community.[10]

Studdert J observed:

> Much of what is contained in the above [passage] would be viewed today as inappropriate and erroneous; also as being patronising and offensive to Aboriginal people, and as failing to recognise their essential dignity and as failing to respect their culture and traditions; further, as failing to appreciate how their interests can best be advanced. Nevertheless, the stated policies of the Board in these annual reports were expressed as being for the betterment and welfare of the Aboriginal people and it is a reasonable inference that the Board believed in those policies and considered the policies as soundly based.[11]

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7 *Williams v Minister, Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of NSW, Studdert J, 25 August 1993) at 16.

8 Ibid at 36.

9 Ibid.

10 Ibid at 28.

11 Ibid at 29.

His Honour appears to invoke the principle that policy decisions of a public authority are not justiciable. He makes no reference to authority. However, the judgment would appear to be based on the principle expressed in the dictum of Deane J in *Sutherland Shire Council v Heyman*:

> The existence of liability on the part of a public governmental body to private individuals under [the ordinary principles of negligence] will commonly, as a matter of assumed legislative intent, be precluded from cases where what is involved are actions taken in the exercise of policy making powers and functions of a quasi-legislative character.[12]

Public authorities are not, however, immune from claims arising out of their operational decisions or conduct. With respect, had Studdert J considered the issue with reference to authority, he might have concluded that while the Board's assimilationist policy was non-justiciable, the Board's proximity to Ms Williams and its conduct and decisions concerning her day to day care gave rise to a duty of care to her.

Studdert J also concluded that there was not evidence available to the plaintiff to show that the Board had any alternative other than to act as they did. There was no evidence that Ms Williams' mother could care for her. There was "no evidence that Lutanda was regarded as other than a reputable children's home at all relevant times".[13] In his view the plaintiff's evidence that she had been ill treated at Lutanda did not assist her because "there does not appear to be any evidence that the Board was aware of its occurrence or that it ought to have been aware of it".[14] This last conclusion seems to depend on the assumption that the Board could or did delegate its duty of care in placing the plaintiff at Lutanda. That conclusion is contrary to High Court authority that a "non-delegable" duty of care will exist where the person to whom the duty is owed is in a position of "special dependence or vulnerability".[15]

Evidence put forward by the plaintiff about the present lack of recognition of mental health problems experienced by adult Aboriginals who had been removed from their families under assimilationist policies[16] was found by Studdert J "to emphasise the difficulties for the plaintiff in seeking to establish that the Board acted negligently towards her between 1947 and 1960".[17] Presumably, His Honour concludes that if these kinds of mental health problems are "unrecognised and untreated" today, it will be difficult for the plaintiff to establish that her risk of psychiatric injury ought

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12 (1985) 157 CLR 424, 500.

13 *Williams v Minister, Aboriginal Land Rights Act, 1983* (Unreported, Supreme Court of NSW, Studdert J, 25 August 1993) at 30.

14 Ibid.

15 *Burnie Port Authority v General Jones* (1994) 102 ALR 42 at 62.

16 Swan P "200 years of unfinished business", *Aboriginal Medical Service Newsletter* (Sydney, September 1988) pp 12 - 17.

17 *Williams v Minister, Aboriginal Land Rights Act, 1983* (Unreported, Supreme Court of NSW, Studdert J, 25 August 1993) at 31.

to have been foreseen by the Board in 1947. The contrary evidence contained in Ms William's psychiatric report that the child welfare literature of the 1940s, emphasised the importance of the atmosphere in which the child grows and the relationship with others within that environment, had already been disposed of by His Honour's conclusion that the Board's policy decisions were not susceptible to judicial scrutiny.

Studdert J said there was no evidence to support Ms Williams' claim that she had been wrongfully imprisoned. He found that Ms Williams' claim of breach of fiduciary duty was attended by "similar evidentiary difficulties as arise in the case framed in negligence".[18] However, as will be seen, the fiduciary claim raises quite different questions to the negligence claim.

The second and determinative reason that Studdert J concluded that it was not "just and reasonable" to extend the time limit was the prejudice suffered by the defendant as a result of the long delay between the events complained of and the commencement of proceedings. The evidence of the Crown was that, after extensive searches, written records about Ms Williams could not be found. Possible witnesses for the defendant were either very elderly or deceased. Studdert J held,

> the effect of the passage of time since the occurrence of the relevant events is such that there would no longer exist an opportunity for the defendants to meet such a case and consequently to have a fair trial.[19]

Studdert J's decision was reversed by a majority of the Court of Appeal. Kirby P, with whom Priestley JA agreed, found that Ms Williams' claim for breach of fiduciary duty did not fall within the time limits imposed by the *Limitation Act* 1969. This is because the *Limitation Act* does not apply, except by analogy, to a cause of action for equitable relief.[20] The remedy for breach of fiduciary duty is not damages, but equitable compensation. Kirby P held that Studdert J erred by dealing with Ms Williams' three causes of action as if the same questions and principles applied to all of them. The "just and reasonable" question could only be applied to the claim for breach of fiduciary duty by analogy and any such analogy would be affected by the operation of equitable principles which would depend on the facts of the case and would require, at the least, more complete evidence.[21] Further, the fact that the fiduciary claim would in any event be heard is a relevant factor in deciding whether it is "just and reasonable to allow the claims for negligence and wrongful imprisonment to proceed."[22]

Studdert J's error vitiated the exercise of his discretion and required the setting aside of his orders. Kirby P determined that, rather than remit the matter, it would be preferable to avoid further delay in the case by having the Court of Appeal exercise

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18 Ibid at 31.
19 Ibid at 36.
20 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497, 509.
21 Ibid.
22 Ibid at 510 - 511.

the discretion. Further evidence about the availability of witnesses had been presented to the Court of Appeal. Kirby P held:

> I acknowledge the disadvantages, and even the prejudice which the respondents suffer as a result of such a long delay since the events occurred which are now complained of. But if "justice and reasonableness" are the criteria such prejudice must be weighed in scales that also take account of justice to the appellant, an Australian Aboriginal, who invokes the courts of her country. And the reasonableness of permitting her to pursue [with] her claim for breach of fiduciary duty, which requires no extension of time under the *Limitation Act*, the two causes of action in tort which depend upon evidence largely common to the claim for equitable compensation for breach of fiduciary duty.[23]

It appears that for Kirby P the question of justice is a broad question which should not be separated from the context in which it arises:

> The law which has often been an instrument of injustice to Aboriginal Australians can also, in proper cases, be an instrument of justice in the vindication of their legal rights. It is not just and reasonable in this case to close the doors of the Court in Ms Williams' face. She should have her chance to prove her case. She might succeed. She might fail. But her cause will have been heard in full. It will then have been determined as our system of law provides to all Australians — Aboriginal and non-Aboriginal — according to law in open Court and on his merits.[24]

Priestley JA agreed with Kirby P. In his judgment, the important questions raised by Ms Williams' claim should be considered after all relevant evidence has been put to the Court at trial.[25] It is implicit in both judgments that narrow procedural questions should not prevent the exploration of broader questions of substantive law and justice. Powell JA, dissenting, held that Ms Williams had not pleaded a claim for equitable compensation for breach of fiduciary duty and, if she had, Studdert J's conclusion that it was not a viable cause of action was correct.

The rest of this article looks at the claim for breach of fiduciary duty raised by Ms Williams. It will examine some aspects of what Priestley JA called "legal propositions which may be novel but which require careful consideration in the light of changing social circumstances."[26]

The importance of the fiduciary obligation

The majority judgments in *Williams* depend on the finding that Joy Williams had a viable cause of action for equitable compensation for breach of fiduciary duty. This is significant, in New South Wales at least, for all those who have a statute barred

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23 Ibid at 514-515.
24 Ibid at 515.
25 Ibid at 516.
26 Ibid.

claim for personal injuries at common law which arose in the context of a fiduciary relationship. If the personal injury is a "latent injury",[27] the question whether it is "just and reasonable" to extend the time limit will be affected by the existence of the fiduciary claim. More significantly, even if the injury is not "latent," and the negligence claim is barred, the cause of action for breach of fiduciary duty can proceed, subject to the equitable doctrine of laches.[28]

The potential scope of this remedy for adult survivors of childhood abuse or neglect is significant. Breach of fiduciary duty is one of the causes of action pleaded in several proceedings brought in New South Wales against the Christian Brothers by men who allege they were subjected to physical, sexual and psychological abuse as orphan children under the control of the Christian Brothers in Western Australia in the 1940 and 1950s.

The remedy is possibly available to other members of the stolen generations who have long been aware of the connection between their adult psychiatric problems and their experiences of removal and institutional or adoptive upbringing but who have not commenced proceedings because of, quite reasonable, mistrust of the legal system or lack of means.

The Supreme Court of Canada has found that parent/ minor child incest is a breach of the parent's fiduciary obligation "to care for, protect and rear their children".[29] A similar obligation could without difficulty be imposed on a person standing in the place of a parent. Indeed, as Kirby P noted in *Williams* "the relationship of guardian and ward is one of the established fiduciary categories."[30] As will be seen however, the situation is not that simple. It is not only necessary to find a fiduciary relationship, it is also necessary to define the obligations which attach to the relationship and to determine whether there are remedies available to protect the interests harmed or threatened by the breach of duty.

Fiduciary relationships

The relationship of guardian and ward is one of the archetypal fiduciary relationships.[31] However, this alone does not reveal a great deal about what a fiduciary relationship is nor about how or why it arises. The following discussion of attempts to define fiduciary relationships and the debate about whether definition is necessary or useful is intended to explain what the statement "the relationship of guardian and ward is one of the established fiduciary categories" means.

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27 *Limitation Act* 1969 (NSW) ss 60F, 60G and 60I and Schedule 5.

28 Delay in bringing proceedings in equity will defeat the claim if the defendant establishes that the plaintiff acquiesced in the defendant's conduct or caused the defendant to act to his or her detriment in reasonable reliance on the plaintiff's acceptance of things as they stood: Meagher Gummow and Lehane *Equity Doctrines and Remedies* (2nd ed, Butterworths, Sydney, 1984) at 755.

29 *KM v HM* (1992) 96 DLR (4th) 289 at 323 per La Forest J.

30 (1994) 35 NSWLR 497 at 511.

31 See *Plowright v Lambert* (1885) 52 LT 646 at 652.

Fiduciary relationships are receiving increasing attention from jurists[32] and academic commentators.[33] Most writers agree that "fiduciary" is a difficult and elusive term. Perhaps the recent interest in the subject is in part a response to the challenge presented by the assertion that "the term 'fiduciary' is itself one of the most ill-defined if not altogether misleading terms in our law."[34] The term emerged in the law in the early 19th century to describe relationships where equity imposed obligations similar to those between trustee and cestui que trust in situations where there was not a trust in the strict sense.[35] However, it has resisted more precise definition. Since the emergence of the term, the law has developed case by case, largely by analogy, it being accepted that "the categories of fiduciary relationships are not closed".[36]

Sir Anthony Mason has said "the fiduciary relationship is a concept in search of a principle."[37] The search for a unifying principle to identify and define fiduciary relationships is seen as necessary to end "uncertainty and vagueness in the law".[38] The complexity and uncertainty of fiduciary law has been described as both a help and a hindrance to its development. On one view:

> The absence of a clear definition has enabled the courts to classify as fiduciaries persons who would not have been so regarded at an earlier time.[39]

On the other:

> The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationships is never closed.[40]

There is disagreement, too, about whether a unifying definition is necessary or desirable. The High Court gave detailed consideration to the application of fiduciary

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32 Mason AF "Themes and Prospects" in PD Finn, ed *Essays in Equity* (Law Book Co, Sydney, 1985); Mason AF "The place of equity and equitable remedies in the contemporary common law world" (1994) 110 LQR 238; Gummow WMC "Compensation for breach of fiduciary duty" in Youdon TG, ed *Equity, Fiduciaries and Trusts* (Carswell, Toronto 1989); Gautreau JRM "The Fiduciary Mystique" (1989) 68 *Canadian Bar Review* 1.

33 Finn PD *Fiduciary Obligations* (Law Book Co, Sydney, 1977); Shepherd JC *The Law of Fiduciaries* (Carswell, Toronto, 1981); Weinrib EJ "The Fiduciary Obligation" (1975) 25 *University of Toronto Law Journal* 1.

34 Finn (1977) op cit at 1. Cf Meagher Gummow & Lehane op cit at 107.

35 Sealy LS "Fiduciary Relationships" [1962] *Cambridge Law Journal* 69 at 71-72.

36 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96 per Mason J. cf *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 at 110.

37 Mason (1985) at 246.

38 Shepherd JC "Towards a unified concept of fiduciary relationships" (1981) 97 LQR 51 at 52.

39 Mason (1994) at 246.

40 *Frame v Smith* [1987] 2 SCR 99 at 135 per Wilson J (dissenting).

principles in commercial settings in *Hospital Products Ltd v United States Surgical Corporation*.[41] The traditional case by case view was expressed by Gibbs CJ:

> I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations . . . and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.[42]

The search for underlying principle found expression in the judgment of Dawson J[43] who agreed with Gibbs CJ in the result and Mason J[44] who dissented in part from the majority. Dawson J observed,

> There is . . . the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.[45]

It is probably more accurate to describe the "vulnerability" inherent in a fiduciary relationship as a consequence of the relationship rather than the indication of its existence.[46] It is easy to think of cases where, if the disadvantage or vulnerability of one party alone created a fiduciary relationship, the cries of horror would echo for a long time. The position of individual consumers in their dealings with trading and financial corporations immediately springs to mind.[47]

One way around this problem is to see the existence of vulnerability or disadvantage as a necessary but not a sufficient condition for the finding of a fiduciary relationship.[48] The vulnerability arises because one party undertakes to, or is required to, *act in the interests* of the other and that other relies on or is dependent on the undertaking.[49] A more difficult question is to identify the "interests" protected in fiduciary relationships.

In Australia, and traditionally in other common law countries, the interests protected within fiduciary relationships are the vulnerable party's legal and economic interests. However, decisions in North America and New Zealand have suggested that fiduciary principles can "defend fundamental human and personal

41 (1984) 156 CLR 41.
42 Ibid at 69.
43 Ibid at 141.
44 Ibid at 96 - 97.
45 Ibid at 141.
46 Cf Gautreau "Demystifying the fiduciary mystique" (1989) 68 *Canadian Bar Review* 1 at 5.
47 Cf Finn "The Fiduciary Principle" in T G Youdon ed, *Equity, Fiduciaries and Trusts* (Carswell, Toronto 1989) 1 at 48.
48 Cf Mason (1994) at 248; *Norberg v Wynrib* (1992) 92 DLR (4th) 449 at 501 per McLachlin J.
49 Cf Gautreau op cit, at 7.

interests''.[50] These interests include freedom from sexual exploitation by parents,[51] physicians[52] and priests.[53] In Canada, but not in New South Wales, the fiduciary relationship between doctor and patient protects the patient's right of access to medical records in the doctor's possession.[54]

This is the key to the opposition to an all embracing definition of fiduciary relationships. Even if it is possible to confine the concept of ''vulnerability'' in the manner described above, it is more difficult to hold the floodgates if what is protected is defined as the vulnerable party's ''interests''. The critics say,

> when analysing the Canadian jurisprudence in this field, one has the uneasy feeling that the courts of that country, wishing to find for a plaintiff, but unable to discover any basis in contract, tort or statute for his success, simply assert that he must bear the victor's laurels because his opponent has committed a breach of some fiduciary duty, even if hitherto undiscovered.[55]

In order to answer this criticism, it is necessary either to define with some particularity the interests that require protection in fiduciary relationships or find a principle which suggests acceptable limits to those interests. McLachlin J suggested in *Norberg v Wynrib* that it is the vulnerable party's potential exposure to interference ''with a legal interest or a non-legal interest of vital and substantial 'practical interest' '' which is at the core of the fiduciary relationship.[56]

In his dissenting judgment in *Breen v Williams*, Kirby P adopted an approach which, rather than attempting to define the interests to be protected, seeks to confine them within the limits of a reasonable expectation of the vulnerable party.[57]

This approach is found in Professor Finn's analysis:

> What must be shown . . . 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. Ascendancy, influence, vulnerability, trust, confidence and dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate the party in the other's affairs or so align him with the protection or advancement of that other's interest that the foundation exists for the 'fiduciary expectation'.[58]

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50 *Norberg v Wynrib* (1992) 92 DLR (4th) 449 at 499 per McLachlin J.
51 *KM v HM* (1992) 96 DLR (4th) 289.
52 *Norberg v Wynrib* (1992) 92 DLR (4th) 449.
53 *Destefano v Grabrian* (1988) 763 P (2d) 275.
54 *McInerney v McDonald* (1992) 93 DLR (4th) 415; cf *Breen v Williams* (1994) 35 NSWLR 522.
55 *Breen v Williams* (1994) 35 NSWLR 522 at 570 per Meagher JA.
56 (1992) 92 DLR (4th) 449 at 501.
57 (1994) 35 NSWLR 522 at 544.
58 Finn (1989) 1 at 46-47.

This definition combines the virtues of a principle which allows informed discussion and debate with a limiting factor, "reasonable expectation", which allows for flexibility in the development of the law while invoking the experience of previous decisions in assessing what is reasonable. The development of the tort of negligence in the 20th Century is an example of this kind of approach.[59]

When this approach is applied to the relationship of guardian and ward, it is clear that the guardian is so aligned with the protection or advancement of the ward's interests that the ward has a reasonable expectation that the guardian will act in his or her interests in and for the purposes of the relationship. It is now necessary to consider which interests a ward will have a reasonable expectation that the guardian will protect or advance.

Fiduciary obligations

In keeping with its origin in trust like relationships, the emphasis in fiduciary law has been on the notions of good faith and loyalty. The fundamental fiduciary obligations are to avoid a conflict between duty and interest and to refrain from using the position for one's own benefit. These are strict requirements which may result in liability to the beneficiary even if the beneficiary has suffered no loss and the impugned transaction was undertaken with the intention of conferring a benefit on the beneficiary.[60]

The conflict between duty and interest can be seen as the basis of some of the Canadian cases which have seen fiduciary obligations as protecting fundamental human and personal interests. The doctor's duty to treat his patient's drug addition was in conflict with his interest in receiving sexual gratification in return for prescribing the drug.[61] The father's sexual assaults on his daughter placed his personal interests before his duty to care for, protect and rear the child.[62]

However, it is one thing to restrict a fiduciary's freedom of action, it is quite another to require a fiduciary to act so as to advance the beneficiary's interest.[63] Imposing affirmative obligations upon a fiduciary runs the risk of creating a mere "surrogate for tort law".[64] That said, the nature of the fiduciary obligation will depend on the particular relationship in which it arises.[65]

The obligations attaching to the relationship of guardian and ward were developed in equity courts in the 18th and 19th centuries. The emergence of separate courts and a separate body of family law in most common law jurisdictions has taken the welfare

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59 cf Aitken L "Developments in Equitable Compensation: Opportunity or Danger?" (1993) 67 ALJ 596 at 603. Aitken suggests that, as with negligence, it might take 20 or 30 years worth of decisions to develop tests of justiciability.

60 *Boardman v Phipps* [1967] 2 AC 46 (HL).

61 *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

62 *KM v HM* (1992) 96 DLR (4th) 289.

63 See Finn (1989) at 25.

64 Ibid at 2.

65 *Re Coomber* [1911] 1 Ch 723 at 728 per Fletcher Moulton LJ.

of children in large part away from equity and notions of fiduciary relationships. The quaint and archaic law of guardian and ward can, however, offer some assistance in determining the obligations which attach to the relationship in more recent times.

A guardian's duties over the property of a ward are broadly similar to any fiduciary relationship involving concern for economic interests. Namely, not to personally profit from the control of the property and not to permit a conflict between duty and interest. Added to these obligations are positive duties to further the ward's interests. These include a duty to shield and protect the ward from harm; to provide for the education of the ward; and, if the wishes of the child's parents as to the child's religious upbringing are known, to pay all deference to them. Curiously, a guardian traditionally had no obligation to support a ward out of the guardian's own means. [66]

A further well established source of positive obligations on fiduciaries is the collection of duties which attach to what is called the "fiduciary office". This arises when a person occupies a position for the benefit of another, exercising powers which do not derive from an agreement with the person for whose benefit he or she holds the position, and the fiduciary alone has the power and duty to determine how the interests of the beneficiary are to be served. [67]

It might be argued that the characteristics of the fiduciary office are descriptive rather than definitive. However, given that the categories of fiduciary relationship are never closed, there is scope for the admission of new holders of the fiduciary office who share the essential characteristics of their more traditional counterparts.

Typical holders of the fiduciary office include company directors, court appointed receivers, and trustees in bankruptcy. [68] The interests protected by the duties of the fiduciary office holder are largely economic. There does not seem to be any reported decision where fundamental human and personal interests are said to be protected by duties imposed on a fiduciary office holder. However, if it is accepted that those interests warrant protection in certain fiduciary relationships, there seems to be no reason to exclude them where the fiduciary relationship carries the particular obligations of the fiduciary office.

These obligations are similar to those imposed on public officials exercising power to make administrative decisions. [69] As in judicial review of administrative decisions, it is not for the court to require the fiduciary to act as the court would have done. Rather the court's role is to ensure that the fiduciary's discretions are exercised in accordance with the fiduciary's duty to serve the beneficiary's

66 Stranger-Jones LI (ed) *Eversley's Law of Domestic Relations* (6th ed, Sweet & Maxwell, London, 1951) pp 472-475.
67 Finn (1977) at 9.
68 Ibid at 8.
69 Ibid at 14.

interests.[70] Finn has identified eight obligations which attend the fiduciary office although he suggests that it is open to the courts to find new duties in new situations. The eight duties are:[71]

1. not to delegate discretions;
2. not to act under another's dictation
3. not to place fetters on discretions;
4. to consider whether a discretion should be exercised;
5. not to act for the fiduciary's own benefit or for the benefit of a third person;
6. to treat beneficiaries equally where they have similar rights;
7. to treat beneficiaries fairly where they have dissimilar rights;
8. not to act capriciously or totally unreasonably.

The nature of the fiduciary office and the duties which attend it will be examined below with reference to the relationship between the Aborigines Welfare Board and Joy Williams. Before that analysis is undertaken it is convenient to outline some characteristics of the main remedy for breach of fiduciary duty: equitable compensation.

Equitable compensation

In some jurisdictions, the supposed "mingling" of common law and equity has been the basis for finding that equitable remedies are available in common law actions and that common law damages principles apply to remedy losses suffered as a result of breach of equitable duties.[72] Australian courts are likely to be more careful.[73] Equitable compensation is the principal remedy for breach of fiduciary duty. The principles on which it is awarded differ in important respects from common law damages.[74] The principle of equitable compensation is either, where appropriate, to require the defendant to give to the beneficiary any profit derived by the defendant from the breach of fiduciary duty; or to place the plaintiff in the same position as if the breach of duty had not occurred. In light of these principles "considerations of causation, foreseeability and remoteness do not enter into the matter".[75] The question, where the beneficiary has suffered a loss, is whether the loss would have

70 Ibid at 15 - 16.

71 Ibid.

72 In New Zealand, *Day v Mead* [1987] 2 NZLR 180, *Mouat v Clark Boyce* [1992] 2 NZLR 559; in Canada, *Canson Enterprises v Boughton & Co* (1992) 85 DLR (4th) 129, *KM v HM* (1992) 96 DLR (4th) 289.

73 See Mason (1994) at 243; Aitken (1995)

74 Ibid. See also Gummow (1989) at 57.

75 *Re Dawson* [1966] 2NSWLR 211 at 215. *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

happened if the breach had not occurred. If it is accepted that fundamental human and personal interests are or can be protected by fiduciary duties, then personal injury, including nervous shock and mental anguish could be compensated if they would not have happened if the duty had not been breached.[76] This possibility has caused concern in some quarters[77] and cautious interest elsewhere.[78] So long as the protection of fundamental human and personal interests proceeds with reference to established principle, the conclusions reached will not be open to criticism as "devoid of all reasoning".[79]

The fiduciary duty of the state to the stolen generations

Under the *Aborigines Protection Act* 1909 the Aborigines Welfare Board had control of children committed to its control by court order and had power to admit a child to its control on the application of the child's parent. The Board had a duty "to provide for the custody and maintenance of the children of aborigines."[80] It could bind a ward as an apprentice and,

> where a ward is not regarded by the Board as ready for placement in employment or for apprenticeship, such ward may be placed in a home for the purpose of being maintained, educated and trained.[81]

The Board was empowered to "constitute and establish under [the] Act homes for the reception, maintenance, education and training of wards".[82]

Clearly, the Board had substantial power and control over the person of the ward. To what extent was the ward entitled to expect that the Board would act in his or her interests for the purposes of the relationship? Was it incumbent on the Board to do any more than maintain, educate and train the children in its care?

In the case of Joy Williams it is not suggested that the Board failed in its duty to maintain, educate or train her. It seems likely that most stolen children would be in a similar position. What is of concern is the exposure of children to physical, sexual and emotional abuse and deprivation from family and cultural heritage. For Joy Williams, the evidence suggests that most damaging to her was a lack of caring parenting. There is some support for an obligation on the Board to provide a nurturing childhood environment in the creation of an offence where someone "ill-treats, terrorises, overworks or injures any ward"[83] and the fact that a child could be committed to the Board's control when a court found that he or she was neglected or uncontrollable. However, it requires a leap of the imagination to infer from these

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76 *Szarfer v Chodos* (1986) 27 DLR (4th) 388.
77 Gummow op cit at 81.
78 Aitken op cit at 603.
79 Cf *Breen v Williams* (1995) 35 NSWLR 522 at 570 per Meagher JA.
80 Section 7(c).
81 Section 11B.
82 Section 11.
83 Aborigines Protection Act 1909 s 13(2)(a).

things alone that a child would have a reasonable expectation that the Board would protect his or her interest in a caring upbringing.

The fact that it is foreseeable that harm would be suffered by the child in the event of failure to protect that interest is the foundation of a negligence action, not a fiduciary obligation. What might give rise to an obligation in a fiduciary sense is the fact that by removing the child from his or her family, the Board has effectively prevented anybody else from providing the kind of care that is necessary. The child is not merely vulnerable, he or she is as entirely dependant on the Board for nurturing as he or she depends on it for maintenance, education and training.

If the nature of the obligation depends on the nature of the relationship, then it is arguable that the Board's absolute control over the physical and emotional wellbeing of the child supports the recognition of a duty to provide for the essential emotional needs of the child. It is well established that a guardian has an obligation to shield and protect a ward from harm. An obligation not to cause harm exists a fortiori.

Even if the kind of affirmative obligation proposed does not find favour, it is arguable in the case of Joy Williams that the Board allowed its interests to conflict with its duty to her. It might be shown that the decision to transfer Joy from Bomaderry to Lutanda was taken to maintain the viability of Bomaderry, which was not operated at the expense of the Board. Had Bomaderry closed, the Board would have had to maintain and educate the children out of its own resources. It should be noted that this supposed breach of fiduciary duty is confined to the particular facts of the case. Principles of more general operation are seen in the established affirmative obligations which attend the fiduciary office.

The Aborigines Welfare Board in its relations with children in its control had all the characteristics of the fiduciary office. First, the Board occupied a position for, among other things, the "benefit of aborigines".[84] Second, its powers over children in its control did not derive from the consent or agreement of the children but from the force of legislation and court orders. Third, the Board alone was given the power to determine how the interests of children in its control could best be served. If, as was argued above, the characteristics of the fiduciary office are not merely descriptive, the Aborigines Welfare Board can be said to owe the particular duties which attend that position.

The duty not to delegate discretions, in a broad sense compares to the observations about non-delegable duties of care in the discussion above of Studdert J's judgment in *Williams*. However, it is not simply that it is not a sufficient defence for the Board to say "we placed the child in the hands of a perfectly reputable home". Rather, the placement of the child in a home not in the Board's control in the absence of careful arrangements for supervision by the Board, involves an impermissible delegation of the power to make decisions about the day to day care and upbringing of the child.

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84 Section 7(1)(a).

The duty not to act under another's dictation would require, for example, that discretionary decisions about where a child was to be placed were made independently. The suggestion by a third party that a "white child" should be raised with children "of her own colour" would have to be treated as no more than one consideration among all the considerations to be taken into account.

Similarly, the duty not to placer fetters on discretions would prohibit a policy which said that fair complexioned children should be placed in homes for children of European descent or appearance. Each individual case and each decision must be approached with an open mind having regard to the purposes of the fiduciary relationship. The duty to treat beneficiaries equally would be breached by discriminating in the treatment of children based on their skin complexion.

The duty not to act capriciously or totally unreasonably would require that decisions about the care of a child not be made in the face of established expert opinion about what kind of care is in the interests of the child.

If Ms Williams can show that her borderline personality disorder and the associated mental stress and suffering would not have happened if a breach of fiduciary duty had not occurred, she may be entitled to equitable compensation. It may not be necessary for her to show that the loss was foreseeable and not too remote, nor that the breach of duty itself caused the loss.

It is also conceivable that a court could recognise an Aborigine's fundamental human and personal interest in his or her Aboriginal culture and heritage. If so, equitable compensation could be available for damage caused when a person was deprived of his or her cultural background as a result of a breach of fiduciary duty by a protection board.

The examples which illustrate this discussion of possible fiduciary obligations of the Aborigines Welfare Board and its equivalents are suggested by the situation of Joy Williams as presented before Studdert J and the Court of Appeal. The evidence for the purposes of those proceedings is only an outline of what may be available at a substantive hearing. As Priestley JA observed, "a properly satisfactory and fully explored answer" to the questions raised by Ms Williams' claim can only be given after all relevant evidence is placed before a Court at trial.[85]

Limits to fiduciary obligations

It is necessary to briefly consider two other issues. First, is there a general fiduciary obligation on the Crown to advance and protect the interest of Aboriginal people? Second, does the above analysis suggest that parents might be made liable to their children for failing to provide them with an appropriately nurturing upbringing?

The judgement of Toohey J in *Mabo v Queensland (No 2)*[86] is based on the existence of a fiduciary relationship between the Crown in right of Queensland and the

85 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 522 at 516.
86 (1993) 175 CLR 1.

Meriam people. There were two possible bases for this conclusion. First, the power of the Crown to alienate land over which the Meriam people had traditional interests and the limits on the Meriam people's power to deal with the land placed the Meriam people in a position of vulnerability and dependency.[87] Second, and in the alternative, a fiduciary relationship was apparent from the course of dealings by the State of Queensland over the Meriam people's islands and the exercise of control over the Islanders by "welfare" legislation.[88] Toohey J made reference to North American cases in reaching his conclusion.

This is not the place for a detailed discussion of the issues raised by *Mabo (No 2)* and the North American cases on fiduciary duties to indigenous people. The author accepts the illuminating account by Camilla Hughes.[89] She concludes that fiduciary obligations have been found to hold governments accountable for their "involvement in the management and disposition of indigenous property and resources". Courts have not been as willing to find an obligation, arising out of the vulnerability or dependence of dispossessed indigenous people, to provide adequate educational and medical facilities.[90] This is consistent with the reluctance identified above to find affirmative obligations in fiduciary relationships and the view that vulnerability is a necessary but not a sufficient condition for fiduciary relations.

If the relationship of guardian and ward is an established fiduciary category, then parent and child must be even more so. Indeed, in the absence of an order of the Family Court of Australia, each of the parents of a child under 18 is the child's "guardian".[91]

As Professor Fleming notes,

> There is consensus that the parent's duty to feed, clothe, maintain and generally care for their child is not enforceable in tort, whatever its moral or other legal (for example criminal) sanctions.[92]

Could parents be found to have fiduciary obligations to feed, clothe and care for their children even if they have no duty of care in tort? One group of commentators have argued in an aspirational sense for the recognition of broad rights of children which are matched by corresponding fiduciary obligations on parents and child welfare authorities.[93]

It is submitted that the imposition on parents of the kind of fiduciary obligation suggested as appropriate for Aborigines protection boards is neither supported by

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87 Ibid at 203.

88 Ibid.

89 Hughes C "The Fiduciary Obligations of the Crown to Aborigines: Lessons from the the United States and Canada" (1993) 16 *UNSWLJ* 70.

90 Ibid at 95 to 96.

91 *Family Law Act* 1975 s 63F.

92 Fleming JG *The Law of Torts* (8th ed, Law Book Co, Sydney 1992) p 682.

93 "The Rights of Children: A Trust Model" (1978) 46 *Fordham Law Review* 669.

principle nor necessary. Care should be taken with fiduciary obligations, as with tort duties, not to create additional pressures in family relationships. Child welfare laws, criminal sanctions and the jurisdiction of the Family Court each in their own way take an interest in the care by parents of their children. The situation of child welfare authorities and the former Aborigines protection authorities is different from the parent/child relationship in a fundamental respect: the governmental authorities supervise themselves and are answerable to themselves. The vulnerability and dependence of a child in the care of the state is, in that sense, absolute.

In the above discussion of fiduciary obligations, it was noted that courts are reluctant to impose affirmative obligations on fiduciaries. The position of fiduciary office holder is an exception to the general rule. Unlike the position of child welfare authorities, parenthood does not fit the description of the fiduciary office in the sense that the parent alone does not have the power and duty to determine how the child's interests are to be served. The discretions exercised by a parent are subject to the possible oversight of child welfare authorities or the Family Court.

This is not to suggest that children and parents are not in a fiduciary relationship, but rather that the content of the fiduciary obligations is not as extensive. As in *KM v HM* a parent will be found to have an obligation not to allow his or her interest in sexual gratification, conflict with his or her duty to care for, protect and rear the child.[94] The law will also intervene, as it has traditionally, to remedy a conflict of interest and duty which affects a child's legal or economic interests.

Conclusion

In those jurisdictions where equitable remedies are not statute barred, compensation for breach of fiduciary duty has the potential to develop into a means of redress for the victims of policies of forced removal pursued by Australian governments for most of this century. The law of fiduciary obligations could also protect some of the interests of children removed from their families under child welfare laws.

It remains to be seen what attitude the courts will take. However, if due regard is paid to the doctrinal and theoretical basis of fiduciary obligations, the remedy need not be seen as a mere substitute for tort or statute in circumstances like these.

Within limits, those who have suffered as children while in the hands of the state or its agents may find that the law is capable of protecting their interests. To that extent, some "rights of the child" may have more than political or persuasive content in the sense that they are capable of protection or their breach is capable of remedy at the suit of the child.

94 (1992) 96 DLR (4th) 289 at 323.