The Academic as Fiduciary: More than a Metaphor?

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There is increasing interest in the role of the university teacher, both from a pedagogic point of view and from a legal one. The first part of this article looks at various pedagogic models or metaphors of the relationship between the academic and the student. It concludes that thinking of the relationship as a “fiduciary” one is a useful metaphor, drawn from the law. The main part of the article returns to the legal (or equitable) origins of that concept. Building on the case law and commentary from Canada, New Zealand, Australia and the UK, the article explores what would be required to bring the obligations of the academic to students within the legal/equitable definition of fiduciary obligations and concludes that at least the criteria used in Canada and New Zealand are met. This leads to a tentative list of fiduciary obligations owed by academics to their students. The conclusion is that even if we do not want to force the extension of enforceable fiduciary obligations to encompass the academic-student relationship, the adoption of those obligations by academics should be part of “best practice”.

Un intérêt grandissant se fait sentir relativement au rôle pédagogique et juridique de l’enseignante, l’enseignant universitaire.

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La première partie de cet article s’attarde sur les modèles pédagogiques et les métaphores de relations entre l’académicienne, l’académicien et l’étudiant. Il en est conclu que le fait de considérer cette relation comme une relation fiduciaria est une métaphore utile découlant de la loi. Le corps de cet article retourne aux origines juridiques (ou équitables) de ce concept. Se basant sur la jurisprudence du Canada, de la Nouvelle-Zélande, de l’Australie et du Royaume-Uni, l’auteur explore ce qui serait requis pour que les relations entre les enseignantes, les enseignants et les étudiantes, les étudiants cadrent avec la définition juridique et équitable d’obligation fiduciaria. L’auteur conclut qu’au minimum, les critères utilisés au Canada et en Nouvelle-Zélande sont rencontrés. Cette conclusion amène l’auteur à tenter de dresser une liste des obligations fiduciaires qui seraient dues aux étudiantes et étudiants par les enseignantes, les enseignants. La conclusion prévalente de l’auteur est à l’effet que même si nous ne voulons pas forcer l’extension et l’application d’obligations fiduciaires pour encadrer la relation enseignant-étudiant, l’adoption de ces principes par les académiciennes, les académiciens devrait tout de même faire partie de leurs « règles de bonne pratique ».

1. Introduction

Researcher, manager, consultant, expert witness, television personality, entrepreneur. The modern academic can be called on to undertake a number of roles in his or her career. But is the one most obviously missing from that list that I focus on in this article: that of teacher/educator. At the core of the university tradition in the British Commonwealth, and at the core of that role is the interaction between the academic and the student. The impetus for the article arose out of discussions about possible models of the academic-student relationship. The model that was chosen as being most suitable for pedagogic reasons was drawn from the law—or more specifically from Equity. It presented the teacher as having a fiduciary-like relationship with students. For reasons that are summarized in Part 3 of the article, I believe that that metaphor is sound and leads to a useful model of the teaching-learning nexus.4

However, the fiduciary metaphor lacked specificity. As I looked at the general characteristics of the equitable concept to fill out the model, it struck me that the academic-student relationship was not simply fiduciary-like, but had a number of the features of a genuine fiduciary relationship in Equity. The fourth Part of the article, therefore, shifts back to the fiduciary as a concept in Equity, and considers whether the case law has developed sufficiently to admit the academic-student relationship as a fiduciary one. I come to the conclusion that, at least in Canada and New Zealand (though less so in the UK and Australia), the case law has indeed expanded sufficiently to incorporate this relationship, and to impose on academics the obligations of a fiduciary in relation to their students.

In the fifth Part of the article, I set out some specific—but tentative—fiduciary obligations that might be invoked in the academic-student relationship. I conclude that regardless of whether these obligations provide practicable remedies for students, it is beneficial for academics to have regard to these obligations: best practice necessitates fulfilling these obligations.

2. Higher Education—The Legal Context

Legal rules governing the relationship between students and universities (and the academics they employ) are multi-layered and inordinately complex.4 At one level, there is a contractual relationship between students and their universities under which, as employees of the university, academic

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3 The educational implications of the metaphor are developed more fully in Jacquelin J. Mackinnon, supra note 1.

staff have obligations to the students. Various general statutes, particularly consumer protection legislation or health and safety Acts, impose additional duties on universities and academics. At a further level, public law controls and remedies may come into play, for example human rights provisions.

Because academics play a number of different roles, an equally involved weave of rules governs their activities. Academics may act as agents of the university or at other times merely as employees. There may be individual contracts with sponsors of research; spin off companies may have academics as directors; researchers have obligations in respect of human subjects of research. The principles of natural justice will govern decisions of certain university committees; while membership of (external) professional bodies will give rise to a further set of obligations. However, it is the teaching and supervision side of academics' lives that this paper concentrates on, and, in particular, the relationship between academic and student.

In contract, the prime relationships are between student and university, on the one hand, and between university and academic, on the other. The student may well have a remedy against the university for failure by the academic to provide, for example, the agreed papers or courses. This does not exclude the possibility of remedies in tort against the teacher (and, vicariously, the university). Additionally there may be statutory or administrative remedies in certain circumstances, such as breach of data protection or of university codes of conduct.

However, my argument is that there remain gaps in the law governing the academic-student relationship which it may be appropriate for Equity to fill, particularly through the concept of fiduciary obligations. To claim that fiduciary obligations apply is not to substitute them for, or deny the pre-existence of, other legal obligations that arise out of the common law of contract or torts. Many fiduciary relationships come into existence as a result of a contract between the parties, for example. But where fiduciary concepts come into prominence is where the purpose of the relationship is to promote the interests of one party ("the beneficiary"), and where there is some discretion or legal freedom available to the other party ("the fiduciary") within the existing relationship to do certain things which may disadvantage the beneficiary or benefit the fiduciary (or both). There may be no other mechanism to control or monitor the exercise of that discretion. The fiduciary is simply trusted to act properly. One way of looking at fiduciary law is as a more specific control on the lawful discretion that resides in the fiduciary, so as to proscribe actions harmful to the beneficiary's interests.

This fiduciary relationship can apply in university-student relations, but it has more immediate consequences in the academic-student relationship, on which this analysis focuses. Whether it is appropriate to invoke Equity here will depend on the nature of the relationship between academics and students. Thus, before entering an analysis of the extensive case law and comment relating to fiduciary obligations, I shall take a closer look at the non-legal features of the academic-student relationship.

3. The Academic-Student Relationship

Conceptions of the nature of the relationship between academics and students are linked, explicitly or implicitly, to ideas about teaching. For example, "transmissive" epistemologies and teaching approaches view the process as the communication and reception of knowledge and skills. If they are communicated clearly, then they are taught. The presentation (whether face-to-face or through another medium) of knowledge, the demonstration of skills, and the assessment tasks are the only connections between the academic and the student. The student is treated as the passive recipient of teacher knowledge and the two operate "at arm's length".

In contrast, "constructivist" theories of knowledge and learning focus on learners, viewing them as active knowledge constructors rather than passive receivers.

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7 Indeed there is a strong case to be made for saying that where there are adequate legal remedies, there is no room for fiduciary-based ones.


9 For a parallel dual set of fiduciary obligations in respect of solicitors, see McKessell v. Bensenman, [1989] 3 NZLR 75 at 86: "Mr Bensenman was the practitioner . . . He was the employer of Mr Betham who was subject to the normal rules of law of the employer/ employee relationship. It is not disputed that the relationship between Mr Bensenman and the plaintiffs was contract. Neither is it disputed that the relationship between Mr Betham and the plaintiffs was that of solicitor and client with it fiduciary obligations . . . It was not disputed by either defence counsel that there were fiduciary obligations for both Mr Bensenman and his employee, Mr Betham" (per Jeffries J).

responsiveness to the student’s learning needs, but it is not the student who
determines these needs; at all times it is the lecturer who makes decisions
about learning needs, the curriculum, teaching pace, methods and assess-
ment.

However, just as lawyers may be tempted to “exploit and reinforce client
dependency on the lawyer’s specialized knowledge and technical skill,”\textsuperscript{15}
so a paternalistic style among academics may encourage or prolong intel-
lectual dependency among students. At the university level, at least, teachers
ought to be seeking to facilitate students moving to an independence of
thought. (Even a transmissive model envisages the students’ departure from
formal learning, and their independent use of the acquired knowledge and
skills after they leave the institution.) Therefore, one telling criticism against
the adoption of the paternalistic metaphor in higher education is that it is
likely to hamper the goals of both academic and student. The student is less
likely to become an independent self-reflective thinker or to realize his or
her potential.\textsuperscript{16}

At the opposite extreme from paternalism is the metaphor of the academic as
agent of the student. As “hired gun,”\textsuperscript{17} the academic’s task is envisaged
as being to carry out the expressed wishes of the student. The student may
wish to develop a deep and critical understanding of the law (or other
discipline); but equally the student may be seeking merely a credential. In
either case, it seems, the academic is required to “deliver the goods”—to
provide, without question or challenge, the knowledge and skills that the
student asserts he or she needs (or that are needed to gain the desired
qualification). But this conceptualization of the role of the academic mis-
represents the nature of higher education (as opposed, perhaps, to infor-
mation provision):

\[\ldots\text{[S]}\text{tudents can’t just be given what they want. They don’t passively\nconsume their education: they actively co-produce it. Staff don’t just feed\nthem information. They challenge their thinking, engage them with ideas,\nassess their understanding, and ultimately decide whether to pass them or fail\nthem. }\ldots\text{ [U]}\text{niversities aren’t just service providers, but regulators and standard-}\]


\textsuperscript{16} For a development of these ideas, see J. J. Mackinnon, supra note 1.


\textsuperscript{18} G. Sharrock, “Why Students are not (Just) Customers and other reflections on Life after
Nor is higher education in fact well matched to contractual paradigms. Beyond some generalizations, it is difficult to specify what outputs might be agreed to; education is a collaborative arrangement necessitating unquantifiable inputs of a personal nature, and there are problems in identifying when there has been a failure by the academic to perform.

Tertiary education is not simply a question of academics imparting "objective" knowledge to student consumers who absorb, sponge-like, a body of objective external knowledge. Knowledge is now widely understood in a constructivist sense; education involves the learner and the teacher in an interactive process of dialogue. 19

Especially at more advanced levels, the relationship between student and academic or supervisor cannot be reduced to a standard set of pre-determined clauses to which relatively equal parties rationally and freely choose to consent.

What is the expected "product" of a university? What has the university agreed to provide the student? . . . The contract theory is a limited basis upon which to assert substantive student rights beyond the right, for instance, to insist that the course be offered, to insist that the promised number of contact hours are offered . . . A student attempting to enforce a right to "an education" or "employability" would have an uphill battle. The contractual analysis may have the benefit of implying certain, easily definable rights, but would not necessarily provide more substantial assistance in a case where a student alleged a breach of contract resulting in a failure to learn. 20

Perhaps the antitode to the coldness and distancing of the contractual metaphor is one which was first used by Charles Fried to describe the lawyer-client relationship: the professional as friend. 21 However "friendship" calls for an extreme form of personal commitment; the friend is loyal even in the face of conflicting obligations to the welfare of society as a whole. While the concept can be conceded as close to that of "mentoring" sometimes found in academic discourse, it does not allow for, it seems, the second role of the academic—as examiner, as "judging" his or her "friend". Indeed a special friendship, carrying with it, as it does, a connotation of preferential treatment, will make that assessment role more difficult and may, indeed,

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20 F. Rochford, supra note 4 at 34.

21 C. Fried, "The Lawyer as Friend" (1976) 85 Yale L.J. 1000.

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[The professional's superior knowledge is recognised, but the client retains a significant authority and responsibility in decision making. . . In a fiduciary relationship, both parties are responsible and their judgments given consideration. Because one party is in a more advantageous position, he or she has special obligations to the other. The weaker party depends upon the stronger in ways which the other does not and so must trust the stronger party. Because the client cannot check most of the work of the professional or the information supplied, the professional has special obligations to the client to ensure that the trust is justified.][22]

Here, the emphasis is very clearly on obligations rather than on (potentially conflicting) rights. In the university context, the imbalance of power and knowledge between academic and student is recognized (unlike under the contractual metaphor) but the student participates in the decision-making (unlike under a paternalistic metaphor). Crucially, the student is not only able to, but has to, rely on the academic having the required knowledge, as well as the ability and willingness to use it in the student's best educational interests. Doubtless, the student's role and responsibilities are greater the more advanced the qualification that is undertaken and the further the studies proceed. Indeed, it could be claimed that, as the educational and transformative process becomes effective, the relationship shifts from the paternalistic end of the scale to the more contractual, while never quite losing its fiduciary qualities because of the persisting power differential.

Thus, the picture that is emerging is one of an inequality of power (and hence student relational—but not, hopefully, intellectual—dependency) subsisting within a relationship of trust, and an expectation legitimately held by the student that the academic will act in his or her interests in and for the purposes of the relationship. The metaphors of paternalism, agency, contract, and friendship all fail to capture the essential nature of the relationship, and provide little guidance for conduct. However, the nexus between academic and student does display sufficient characteristics that are associated with the idea of a fiduciary relationship to warrant further exploration of the academic as a fiduciary in Equity. 23


23 Disappointingly, this is not done in R. P. Schlufer, "The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?" (2004) 45 S. Tex. L. Rev. 753, where the...
4. Abandoning Metaphor in Search of the Law

Bayes borrowed the fiduciary metaphor from Equity. My present purpose is to consider whether describing the academic-student relationship as a fiduciary one is more than a metaphor; whether it reflects a legal reality. That entails an analysis of the fiduciary concept in the law of Equity.

Unfortunately, there is no agreed definition of, no single acknowledged principle underlying, and no universally accepted set of characteristics which constitute either a fiduciary relationship or fiduciary obligations. As Lord Cooke, then President of the New Zealand Court of Appeal put it, "[i]t is well known that "fiduciary" is a somewhat imprecise term. It cannot be comprehensively defined and the obligations of persons found to be in some sense fiduciaries vary with the circumstances."

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4. The ACADEMIC AS FIDUCIARY

Lord Browne-Wilkinson also warned that "... the phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case."27

Similarly Lord Woolf MR wrote that "[t]here is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation."28

Precisely what those categories are remains disputed.29 It can be said with some certainty that fiduciary obligations can arise in two types of circumstances: a pre-existing recognized status, or in specific situations.30

(a) Fiduciary Categories

Firstly, certain relationships have been traditionally identified as "fiduciary", such as those of trustee-beneficiary and solicitor-client.31 However, it is worth noting that characterizing the relationship as "fiduciary" does not entail that every feature of that relationship has a fiduciary quality to it, since some features fall under the common law such as tort or contract.32

As Lord Wilberforce noted in New Zealand Netherlands Society v. Kays:

A person . . . may be in a fiduciary position quaod a part of his activities but not quaod other parts: each transaction, or group of transactions, must be looked at.33

31 Farrington v. Rowe McBride & Partners, [1985] 1 N.Z.L.R. 83. See also Sims v. Craig Bell & Bond, [1991] 3 N.Z.L.R. 535 at 543: "Where the firm is acting as solicitor for the client . . . a fiduciary duty exists; the relationship between lawyer and client automatically gives rise to the duty; the reposing trust by the client is automatically assumed," per J. Richardson.
Secondly, there may be relationships which are not primarily "fiduciary", but within which specific fiduciary duties are imposed or assumed. J. Arnup wrote:

In my opinion the category of cases in which fiduciary obligations and duties arise from the circumstances of the case and the relationship of the parties is no more closed than the categories of negligence at common law.  

Often, but not invariably, then, while it is a useful shorthand to refer to a "fiduciary relationship", it may be more accurate to speak of fiduciary duties or fiduciary obligations, either individually or as a set, rather than of a fiduciary relationship. For present purposes, a fiduciary can be thought of as a person who has fiduciary obligations regardless of whether those obligations are status- or fact-based.

The academic-student relationship is not one of the traditional (status-based) fiduciary relationships and no attempt is being made here to suggest that it should be considered as such. However what is being claimed is that the prevailing conditions are such that a number of specific fiduciary obligations can be read into the academic-student nexus. This sits comfortably with Flannigan's formulation of the fact-based fiduciary relationship:

People trust one another for particular purposes or to accomplish certain tasks. . . . [One] kind of trust may be created over time or may arise immediately because of the knowledge, expertise or office occupied by the trusted person. It is a "deferential" kind of trust in the sense that the trusting person will defer to the judgment of the trusted person.

Yet the characteristics of this type of fiduciary relationship are contested. Given the degree of dispute as to when these fiduciary obligations can be invoked, my intention here is to adopt for the time being a conception of fiduciary obligations which I am not pretending is a comprehensive account.

34 A locus classicus in New Zealand is the case of Coleman v. Myers, [1977] 2 N.Z.L.R. 225, 1977 W.L. 59790 (New Zealand S.C.), where, because of the particular family character of the company involved and the close relationships in existence, company directors were found to owe fiduciary duties towards shareholders whom they bought out.


36 Here, as in the literature generally, no distinction will be made between the terms "fiduciary duty" and "fiduciary obligation".


39 Frame v. Smith, ibid. at 99.
“Fiduciary duty” in that sense has sometimes been referred to as a “duty of loyalty”.41

The most striking feature of this picture of the fiduciary relationship is the idea of vulnerability or dependency within a trusting relationship. Although, as J. Fisher states, there is increasing talk of the fiduciary’s duty of loyalty as the core of the relationship,42 it does not appear to me that that terminology is any clearer: the elements within “a duty of loyalty” need to be spelled out as much as those in “fiduciary duty”. Indeed, after describing loyalty as “the distinguishing obligation of a fiduciary”, Millet L.J. then breaks this down into “several facets” in the leading English case, Bristol & West Building Society v. Motherw.43

(b) Characteristics of a Fiduciary Relationship

(i) Vulnerability Within a Trusting Relationship.

According to Weinrib in his influential University of Toronto Law Journal article of 1975, “. . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion . . .”, a passage that was cited with approval by Dickson J. in the leading Canadian case of Guerin v. The Queen.45

In Australia, Dawson J. stated the following in Hospital Products Ltd. v. United States Surgical Corporation:

There is, however, 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.44

Perhaps it is more illuminating to put it the other way round: it is as a result of placing trust in another that the individual becomes vulnerable to that other, as is shown by Mason J. in the same case:

41 Ibid. See text accompanying footnotes 71–75.
42 Bristol & West Building Society v. Motherw, supra note 32 at 18 per Millet L.J. The passage is reproduced infra note 76.
43 Guerin, supra note 35 at 384.

45 Ibid. at 97. Frankel points out that, even in situations where the relationship is entered into as the result of a contract between the fiduciary and beneficiary (he uses the term “entrustor”), it is not any initial inequality of bargaining power which creates the fiduciary nature of the relationship, but rather the vulnerability of the entrustor which “stems from the structure and nature” of the relationship. The power to benefit the entrustor, which the fiduciary gains on entering the relationship, also “enables him to injure the entrustor”: T. Frankel, “Fiduciary Law” (1983) 71 Cal. L. Rev. 795 at 810.
Admittedly it would be a mistake to view the student as entirely dependent on the academic in the way that a child is dependent on his or her parent. Tertiary education students are, in all but exceptional cases, adults and have acquired or are acquiring independent research skills and honing critical faculties which are intended to make them less reliant on the academic’s authority. Students can and should challenge the ideas that are presented to them as fact, as given, as orthodoxy. But that is not inconsistent with the fiduciary concept. For example, in Goldsworthy v. Brickell, the test was not whether in the circumstances “the relationship was one of domination of one party by the other”. Rather, “...it is enough to show that the party in whom the trust and confidence is reposed is in a position to exert influence over him who reposes it.”

Thus the fears of Ian Kennedy—who that the adoption of a fiduciary model for the doctor-patient relationship would lead to a re-entrenchment of paternalism—are unfounded. It simply does not follow that claiming that a doctor has a responsibility to promote the best interests of the patient entails that the doctor alone determines what those “best interests” are. The reasons for the professional wanting to choose a particular course of action can be explained to and discussed with the patient or student, and the patient or student can thus be an active participant in the decision-making. As its use in the commercial and legal world shows, the concept of a fiduciary relationship does not mean that the beneficiary lacks capacity or is totally passive: a lawyer still owes fiduciary duties to his or her client, even where that client is a powerful corporation or an assertive entrepreneur.

(ii) Paramouncty of the Beneficiary’s Interest.

Finn observes that various factors sometimes put forward as touchstones for a fiduciary relationship—“ascendancy, influence, vulnerability, trust, confidence or dependence”—are not sufficient in themselves. Rather, “[w]hat must be shown...is that the actual circumstances of the 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.”

Recently Burrows has ventured the following:

It is submitted that an even more illuminating way of thinking about a fiduciary duty is that it is a duty to look after another’s interests. That duty, depending on the context, may be strict or may be one to use reasonable care.

I suggest that this test is met in the case of the academic-student relationship. There can be little doubt that the whole purpose of the relationship is for the student to acquire knowledge, learn skills and generally benefit educationally. This is a joint enterprise. While the student clearly has a significant role in achieving that outcome, the academic’s prime concern, too, is that the student achieves success.

(iii) Invoking Loyalty to Constrain Discretion.

The academic’s commitment to the student’s best interests must be taken on trust. It would be easy for the academic to resort to a paternalistic stance or, indeed, to go against the student’s interest (possibly without the student being aware of it) and hence breach the fiduciary obligations. The differential in knowledge between academic and student is such that, at least in some areas of knowledge and skills, students cannot know in advance what it is that they need to learn in order to understand a particular topic. And it is difficult for them to monitor the academic’s commitment to their interests. Since legal education is transformative, the student has the knowledge to evaluate the effectiveness of the teaching and learning process only after it
has occurred. Until then, he or she will have to take on trust that the methodology and content of the teaching are beneficial.\textsuperscript{54} It is this fact that has led one commentator to say that, independently of the specific duties imposed on a fiduciary, the beneficiary has an overarching "entitlement that the fiduciary shall act with the right motive", that is, out of loyalty to the beneficiary's best interests.\textsuperscript{55}

Looking back at the account of a fact-based fiduciary relationship that I have taken from Fisher J. in BNZ v. NZ Guardian Trust Co.,\textsuperscript{56} the academic-student relationship seems to fulfill the criteria, and a fortiori those of Wilson and McLachlin JJ. in Canada. The student is in an unequal relationship with the academic, and is reliant on the academic's own sense of loyalty as a guarantee that the academic will not waver from the promotion of the student's best interests.

(c) The Scope of Fiduciary Relationships

However, one consideration that might inhibit the reading of fiduciary obligations into the academic-student relationship is the tradition—particularly in England—that fiduciary duties are restricted to property dealings or commercial affairs. The opportunity of evaluating a medical professional's conduct from an equitable perspective was rejected by Lord Scarman in Sidaway v. Bethlehem Royal Hospital Governors:\textsuperscript{57}

Counsel for the appellant referred to Nocton v. Lord Ashburnham [1914] AC 932, [1914-15] All ER Rep 45 in an attempt to persuade your Lordships that the relationship between a doctor and patient is of a fiduciary character entitling a patient to equitable relief in the event of a breach of fiduciary duty by the doctor. The attempt fails: there is no comparison to be made between the relationship of doctor and patient with that of solicitor and client, trustee and cestui que trust or the other relationships treated in equity as of a fiduciary character.

Hoyano notes that "[u]nhackling the fiduciary principle from property trust law to roam through commercial and professional relationships has been criticized as making the whole concept unrecognisable."\textsuperscript{58} However, from a Canadian perspective, she does not accept this view. Indeed, a property base is not universally accepted as a necessary feature of a fiduciary relationship. Magnusson explains this in relation to doctors:

Non-commercial relationships, including doctor/patient, parent/child and minister/parishioner, are equally in need of selfless loyalty from the ascendant party, and the breach of duty may be just as devastating for the vulnerable, abused party, albeit not always in financial terms.\textsuperscript{59}

If it is appropriate to synthesize undue influence cases into the fiduciary concept,\textsuperscript{60} then there is English support too for a broader view.\textsuperscript{61} Certainly this line of reasoning has found favour with Canadian judges\textsuperscript{62} and academicians.\textsuperscript{63} It is argued most vigorously by Flannigan:

There would appear to be no good reason for insisting on a definite standard content for either status or fact-based fiduciary relationships. . . . What is important is the prevention of the abuse of trust by fiduciaries. . . . All of this must mean that there can be no prior limitation on the kinds of behaviour that will offend the fiduciary obligation. . . . Conduct that might have been excused in years past may need to be reconsidered in the changed circumstances of today. To resolve these questions properly, the judges must return to the policy which underlies the obligation. That policy admits of one general test. Is the act in question inconsistent with the maintenance of the integrity of the trusting relationship that existed at the time?\textsuperscript{64}

In the Canadian case Norberg v. Wynrib, where the doctor's sexual contact with his patient was claimed to be a breach of the doctor's fiduciary obligations to his patient, McLachlin J. stated that fiduciary principles " . . . are

\textsuperscript{54} This trust rests not simply in the individual academic, but also in those who designed the degree programme, making certain subject compulsory and others optional. See also D. Luban, "Paternality and the Legal Profession" (1981) Wis. L. Rev. 454 at 467-474.


\textsuperscript{56} Supra note 40.


\textsuperscript{59} R. D. Magnusson, "Specific Consent, Fiduciary Standards and the Use of Human Tissue for Sensitive Diagnostic Tests and in Research" (1995) 2(3) J. Law & Med. 206 at 228. Similarly, Sealy maintains that a fiduciary relationship may arise even where no property is involved: L. S. Sealy, "Fiduciary Relationships" supra note 29 at 76.

\textsuperscript{60} Such an approach is supported by Millett L.J., "Equity’s Place in the Law of Commerce" supra note 29, and R. Flannigan, supra note 37, but opposed by S. Worthington, "Fiduciaries: When is Self-Denial Obligatory?" (1999) 58 Cambridge L.J. 500.

\textsuperscript{61} See Sir George Turner V-C in Billage v. Southee, (1852) 9 Hare 534 at 540, referring to surgeon-patient advice.

\textsuperscript{62} Wilson J. in Frame v. Smith, supra note 8; La Forest J. in LAC Minerals Ltd. v. International Corona Resources Ltd, supra note 38; McLachlin J. in Norberg v. Wynrib, supra note 38.

\textsuperscript{63} E.g. Hoyano, supra note 58 and R. Flannigan, supra note 37.

\textsuperscript{64} R. Flannigan, ibid. at 320–321.
capable of protecting not only narrow legal and economic interests but can also serve to defend fundamental human and personal interests."\(^{65}\)

The values that are held in high esteem in modern societies are no longer purely financial or property-based; the scope of fiduciary relationships recognized in the courts should similarly no longer be so constrained. This approach has found support in New Zealand from Thomas J., writing extra-judicially:

> Ultimately, the relationship of fiduciary and beneficiary will exist whenever the circumstances are such as to require the imposition of a fiduciary obligation on the ascendant party to prevent him or her unfairly exploiting their position to their own advantage. In determining whether the circumstances give rise to this fiduciary obligation, or duty of loyalty, the Courts will have regard to a number of factors, such as the power, dominance and influence of the ascendant party, and the trust, dependence, reliance and vulnerability of the weaker party.\(^{66}\)

There is wider judicial support in New Zealand cases, too, for extending fiduciary duties to non-commercial situations of trust.\(^{67}\)

There may arise situations in the academic-student relationship where equitable remedies will be granted for abuse by an academic of a student's (intellectual) property or commercial interests. But it is my assertion here that the New Zealand judges have not ruled out going even beyond these to other non-commercial breaches of the fiduciary duties which may be owed by academics to their students. Nor should Lord Scarman's strong statement in *Sidaway*\(^{68}\) be seen as ruling out such an approach in England.\(^{69}\) In a developing climate, he could well be interpreted as merely ruling out the extension of status-based fiduciary law, but not of fact-based fiduciary obligations.

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\(^{65}\) McLachlin J. in *Norberg v. Wynter*, *supra* note 38.


\(^{68}\) *Supra* note 57.


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(d) The Constituent Fiduciary Obligations

It is common to reduce fiduciary duties to only two, both of which are prescriptive rather than prescriptive—the duty to avoid conflicts and the duty to avoid secret or unauthorized profits.\(^{70}\)

The fiduciary duties relate to improper profits and the avoidance of conflicts of interest, and we should no longer use fiduciary terminology to describe other duties to which fiduciaries and others may be subject.\(^{71}\)

Perhaps these two duties can be reduced to one—the duty of loyalty.\(^{72}\) In this light, a putative fiduciary duty to disclose information to a beneficiary\(^{73}\) only comes into play where the information to be disclosed relates to a conflict of interest—to fail to disclose would be disloyal. Similarly a duty of confidentiality is derived from the duty to avoid conflict.

In contrast, Finn fills out these elements, presenting as "the accepted mainstream of fiduciary obligation" eight duties in total.\(^{74}\) Others bring in the cases on undue influence under a broad fiduciary umbrella.\(^{75}\) But there is general agreement that the duties are prescriptive rather than prescriptive. While there may be prescriptive duties to do positive acts (such as are involved in a duty to take care), these are the province of tort (or contract) law. It is left to Equity to identify the negative or prescriptive duties which forbid someone to breach his or her duty of loyalty. Millett L.J. has put it thus:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where

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\(^{72}\) *Bristol & West Building Society v. Mothew*, *supra* note 32 at 18 per Millett L.J.; *BNZ v. NZ Guardian Trust Co.*, *supra* note 40 at 246, per Fisher J. In an interesting variation, Birks has suggested that the core fiduciary obligation is a compound obligation requiring a person to act in the interests of another with due care and disinterestedly: P. Birks, "The Content of Fiduciary Obligation" (2002) 16 Trusts L. Inst’l 34.

\(^{73}\) See *McKaskell v. Bensen*, *supra* note 9.

\(^{74}\) P. Finn, *Fiduciary Obligations* (Sydney: Law Book Co, 1977) at 78, but he too later reduces these to the standard two in P. Finn, *supra* note 30.

his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.76

The scope of these obligations is determined in the context of the specifics of the situations that arise. Accepting that a general duty of loyalty can be teased out in particular settings, I suggest a tentative list of fiduciary-like obligations placed on the academic in respect of students.

5. Giving Specificity to the Fiduciary Duties of the Academic

The academic has, in respect of each student who is taught by, supervised by, or advised by that academic, a number of duties, some of which are fiduciary ones. However, the mere fact that there is a fiduciary relationship does not mean that every failure by the academic is a breach of a fiduciary duty. Since “breach of fiduciary obligation . . . connotes disloyalty or infidelity [and m]ere incompetence is not enough,”77 the academic’s fiduciary duties are limited. There may be alternative remedies available to a dissatisfied student within the university’s own regulations or in contract or tort law. That said, it is possible to identify some tentative fiduciary obligations in the academic-student relationship.

(a) A Duty Not to Use Students’ Research as One’s Own78

This fiduciary duty arises from the potential for the academic to profit from his or her access to the intellectual property of a student, though an alternative view is that to use a student’s research, entrusted to the academic for the purposes of teaching or evaluation, for a different purpose (publication) would be a breach of confidence or the consequence of undue influence

76 Bristol & West Building Society v. Mothew, supra note 32 at 18 per Millett LJ.
77 Ibid.

(b) A Duty Not to Improperly Profit Financially from the Teaching Relationship

An academic who requires students to purchase his or her own book may be thought of as improperly profiting from the relationship, at least if it is not a recognized standard text for that course or module.79

The rule of equity which insists on those, who by use of a fiduciary position makes a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides . . . or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances, been made.80

However if the transaction is at arm’s length and open, then it may be treated as a legitimate commercial transaction.81 The academic might be safer to merely recommend the text, rather than require that it be purchased.

79 The status of such work may be debatable, but as P. Finn puts it, “Perhaps the most sterile of the debates which have arisen around the subject of information received in confidence is whether or not such information should be classified as property.” Ibid. at 131.
80 While “moral rights” protection plays a role here, it does not cover some situations where a research supervisor exploits the student’s vulnerable position in the relationship. I have some doubts about whether an action for breach of confidence would provide a remedy in every case.
81 An example, known to the author was where a lecturer had the Faculty Office sell directly to first year students his obscure monograph that he had listed in the course outline as “required”.
A Duty Not to Favour One Student Over Another

A fiduciary is not prohibited from "serving two masters." After all, a solicitor’s loyalty is not literally exclusive to one client; rather he or she can be retained by many clients simultaneously. It is only when those clients' interests may be in direct conflict that concerns arise. Similarly,

Professorial conflicts of interest come in many guises: clashes between one’s personal interests and core job functions; between one’s outside activities and core functions; between core functions; and within a particular function. . . . In some instances, conflicts of interest involve nothing more than conflicts of time—the inability to get one job done competently because of the time needed to perform another job competently. 85

It is entirely possible to teach a couple of hundred students in the same class while remaining "loyal" in the required sense to each of them. Although education can be viewed as a "positional good" the interests of one student are not directly harmed by the fact that another is being taught the same thing at the same time. Only those conflicts of interest which directly undermine a student’s interest can constitute a breach of fiduciary duty in this setting.

That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal. 86

An example of a breach in such a setting is provided by the English Law Commission: where a brokerage firm "becomes aware of an investment opportunity and only advises some of its customers of the opportunity, it will be in breach of its duty" [to the others].87

In the academic setting, this obligation may entail not boosting a student’s marks unmeritoriously (especially if marks are "scaled" to a bell curve), not capriciously giving a time extension to some students but not others, or not giving extra tuition to some students from which others are excluded.

There may be situations where an academic is asked to support or provide a reference for two or more students who are seeking the same scholarship or employment opportunity. Here the students’ interests do conflict. In a parallel setting of discussing the state’s putative fiduciary obligations to (all) its citizens, Evan Fox-Decent has suggested overlaying the obligation with a (public law) duty of fairness:

Put another way, fairness, coupled with reasonableness, supplies the legal framework necessary for the fiduciary to exercise discretionary authority in a way that permits her to act as faithfully as possible on behalf of each person subject to her authority. 88

While this suggestion has its attractions, importing other concepts such as fairness into the fiduciary relationship seems unnecessary. The academic in this situation can still perform his or her fiduciary duties to each student (without taking sides “against” the other) by putting forward the best (but honest) case for each, and leaving it to others to make the decision on who wins the scholarship or who is employed.

A Duty Not to Take (Sexual) Advantage of a Student

If the lawyer permits the otherwise benign and even recommended client reliance and trust to become a catalyst for a sexual relationship with that client, the lawyer may violate one of the most basic ethical considerations, i.e., not to use the trust of the client to the client’s disadvantage. 89

It is more than likely that remedies under tort law (relating to battery) are available if a student did not genuinely consent to sexual conduct with an

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84 See P. Finn, supra note 74 at 17 and chap. 12.
85 P. Heyden, "Professorial Conflicts of Interest and 'Good Practice' in Legal Education" (2000) 50 J. Legal Educ. 358 at 359. See K. B. Davis, "Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives" (1985) 80 N.Y.U.L. Rev. 1 at 5 which considers that "the fiduciary’s ever-present incentive to ‘shirk’—that is, to divert attention from productive activities that benefit the principal to activities that offer more leisure or personal gratification to the fiduciary" is simply an example of "more subtle mechanisms for self-enrichment".
86 See S. Marginson, Markets in Education (St-Leonards, NSW: Allen & Unwin, 1997).
87 Bristol & West Building Society v. Moir, supra note 32 at 19 per Millet LJ.
88 Law Commission, Fiduciary Duties and Regulatory Rule, supra note 30 at 35.
90 I consider that what Birks has termed the "parasitic obligation of disinterestedness" that is attached to the fiduciary relationship can be called into service here: see P. Birks, supra note 72.
91 ABA Committee on Ethics and Professional Responsibility, Sexual relations with clients, ABA Formal Opinion 92-364, July 6, 1992.
academic, but in the US and Canada, there are dicta to the effect that taking sexual advantage of a person in a dependent and vulnerable relationship can amount to a breach of a fiduciary duty. If, as I contend it should be, it is granted that a student is vulnerable in this sense, there seems no reason to distinguish academic-student relationships from solicitor-client relationships or doctor-patient relationships.

Set against that is the very firm view of Hayton that it is not the role of Equity to intervene in such cases: fiduciary obligations are not to be extended beyond the protection of economic interests; and “a person’s sexual integrity is protected by the criminal law and by the common law.”

(c) Duty Not to Withhold Relevant Information

Significant failure by the professor to keep up to date with changes in the subject that is being taught, such as to render the lectures not “fit for purpose”, for example, would likely fall under other areas of law, possibly contract, possibly tort, possibly statutory, depending upon the rules in place in that particular jurisdiction. It would not be the basis for an equitable claim. The picture is less clear where, for example, a supervisor fails to inform a Masters or Doctoral candidate that, if a thesis is submitted in its present form, it will fail. Although it is arguable that there is a general conflict of interest between two major roles of the academic—as teacher and as examiner—and that this itself constitutes a breach of fiduciary duty, the situation is little different from that of the trustee who advances the interests of the beneficiary but has to remain within the framework of the law when doing so. However, whether there is a duty to disclose likely failure to a student is unclear.

There are two well known New Zealand solicitor-client cases in this area: McKaskell v. Benseman and Boyce v. Mowat. In the former, the failure of a solicitor to bring to his clients’ attention a letter received from another party’s solicitors was held to be a breach of fiduciary duty:

A primary obligation of the fiduciary is to reveal all material information that comes into his possession concerned with his client’s affairs. The fiduciary must, in dealing with those to whom he owes such an obligation, reveal fully all circumstances that might affect their affairs, and is thus under a duty of disclosure not imposed on others.

The provision of feedback on progress may be seen as an incident of the teaching contract (or of a duty to teach competently); however if it is not viewed in this way, it is conceivable that it might constitute a fiduciary obligation.

This tentative list is not exhaustive. There may be various other situations in the academic-student relationship where it would be possible to identify breaches of some fiduciary duty. My purpose here is to suggest that academics reflect on what it means to think of themselves as fiduciaries—whether by metaphor or in law.

6. Fiduciary Obligations—Metaphorically and in Law

What is being argued is that an academic does owe duties to students beyond those established in contract or tort. These are equitable duties arising out of a combination of factors, among them the nature of education as benefiting the student, the need for, and expectation of, trust in the teaching-learning relationship, and the power imbalance between academic and student. The fiduciary nature of the various obligations means that it is quite appropriate to describe the academic as fiduciary in law as well as metaphorically. Indeed, Birks argues that all fiduciary obligations are merely analogous to those of a trustee. He writes:

The truth is that “fiduciary” is one of those words which means what it does, and what it does is to form a bridge from the express trust to other analogous situations. The basis of the analogy, however, is not spelled out and not stable.


93 D. Hayton, supra note 70 at 292.

94 Supra note 9.


96 McKaskell v. Benseman, supra note 9 at 87 per Jeffries J. See also Coleman v. Myers, supra note 34.

97 For the view that it may now be subsumed within negligence, see Henderson v. Merrett Syndicates Ltd, supra note 27.

98 Harpur raises the possibility that there remains a further relevant constraint, namely that the fiduciary is unable to delegate his or her powers: C. Harpur, “Fiduciary Obligations and Fiduciary Powers” in P. Birks ed., supra note 58. He does however acknowledge that such a requirement has undergone significant relaxation over the years, such that necessity may over-ride the obligation. But it easy to envisage a doctoral candidate refusing to be “transferred” to a new supervisor on the departure of the original one.

99 P. Birks, supra note 72.
The word is thus the vehicle for the extension of incidents of the express trust to trust-like situations. A fiduciary relationship is a relationship analogous to that between trustee and beneficiary, and a fiduciary obligation is a trustee-like obligation exported by analogy.

It is my contention that there are, awaiting judicial recognition, fiduciary-like obligations owed by academics to students. It is entirely consistent with the tradition of extending the scope of fiduciary obligations by analogy to bring the academic-student relationship within this area of law. Nevertheless, it has to be admitted that, even if such obligations are recognized, it may be problematic for a student to obtain a remedy for a breach of the fiduciary-like obligations identified. This is implicit in the words of Fletcher Moulton L.J. written nearly a century ago in *In re Coomber*.

Fiduciary relations are of many different types: they extend from the relation of myself to an errand boy who is bound to bring me back my change to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever, any of these types of interference is warranted by it. They conclude that any kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.\(^{100}\)

I have no doubt that occasions will arise when the Courts would, indeed, be justified in “interfering” in the relationship between academic and student on the grounds of breach of a fiduciary obligation.

More importantly, however, there is value in identifying in advance what those academic fiduciary obligations entail since, particularly in their extended contexts, the function of fiduciary obligations is not merely—and perhaps even not primarily—to provide compensation in the event of a breach. Instead it is to guard against the temptation for the fiduciary to misbehave. It provides guidance for future good conduct.

In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in

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100 *Coober, Re.* [1911] 1 Ch 723, 1911 WL 15658 (Eng. C.A.) at 728–729 [Ch].
sional discipline. In fact the codes do more... New members of the profession can be more easily instructed into acceptable standards of behaviour, and members of the profession generally may be dissuaded from unacceptable behaviour, and may have any disposition to act correctly reinforced.103

There is thus no need to await judicial imprimatur to recognize the content of academic fiduciary obligations. The obligations can be presented as “best practice” or as a code of conduct. However if that is not done, and the obligations are not complied with, Equity has the potential to be invoked as a guarantee of them. There is more to the idea of the academic as fiduciary than a metaphor about the teaching-learning relationship.