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Table of Contents
Table des matières

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 fiduciaire 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 fiduciaire. 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 principale 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[1]

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.[2] 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

1 This article owes its origins to Jacquelin Mackinnon's analysis of models of graduate supervision, now formalized in Jacquelin J. Mackinnon, "Academic supervision: seeking metaphors and models for quality" (2004) 28(4) J. Further & Higher Educ. 395. I am grateful to her for sparking my interest in the topic, and for her subsequent comments and suggestions during the writing of this article.

2 For the academic in a teaching role, I shall use henceforth the terms "academic", "professor", and "teacher" interchangeably. The legal principles that are relied on are drawn primarily from New Zealand, but also from the UK, Canada and Australia.

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.[3]

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

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

4 See inter alia, D. Palfreyman & D. Warner, *Higher Education Law*, 2nd ed. (Bristol: Jordans, 2002) at chap. 6; D. J. Farrington, *The Law of Higher Education*, 2nd ed. (London: Butterworths, 1998) at chap. 7; O. Hyams, *Law of Education*, (London: Sweet & Maxwell, 1998) at chap. 12; C.B. Lewis , "The Legal Nature of a University and the Student-University Relationship" (1983) 15 Ottawa L. Rev. 249; F. Rochford, "The Relationship between the Student and the University" (1998) 3(1) Austl. & N.Z.J. of L. & Educ. 28; S. Kos & Russell McVeigh, "The View from the Bottom of the Cliff: Enforcement of Legal Rights between Student and University" (1999) 4(2) Austl. & N.Z.J. of L. & Educ. 18.

staff have obligations to the students.[5] 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).[6] 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.[7] 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

5 *Clarke v. University of Lincolnshire and Humberside*, [2000] 1 WLR 1988, [2000] 3 All E.R. 752, 2000 WL 389551. See, also, *Grant v. Victoria University of Wellington*, (Unrpt., HC Wellington CP312/96, 13 Nov 1997, Ellis J). See also Sam Middlemiss, "Liability of Universities for Students under the Law of Contract" (1999) 19 Jurid. Rev. 170.

6 See M. R. Davies, "Universities, Academics and Professional Negligence" (1996) 12(4) Professional Negligence 102; W. F. Foster, "Educational Malpractice: A Tort for the Untaught" (1985) 19 U.B.C. L. Rev. 161; S. Varnham, "Liability in Higher Education in New Zealand: Cases for Courses?" (1998) 3(1) Austl. & N.Z.J. of L. & Educ. 2.

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.

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.[8]

This fiduciary relationship can apply in university-student relations, but has more immediate consequences in the academic-student relationship, on which this analysis focuses.[9] 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".[10]

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

8 For such a view see E. J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1; *Frame v. Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 at 99, 1987 CarswellOnt 347 (S.C.C.) per J. Wilson.

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

10 P. Ramsden, *Learning to Teach in Higher Education*, (London/New York: Routledge, 1992) at 111–112.

receivers or absorbers.[11] In conceptions of teaching that are consonant with constructivism, teaching is viewed as making learning possible[12] and as supporting the construction of knowledge by contributing to the learner's development in the cognitive and affective domains.

Although a preference may be detected, it is not my intention to identify a "right" or a "wrong" conception of teaching. But, whatever general model of relationship between professor and student is adopted must be sufficiently flexible to accommodate these differing conceptions of teaching and learning.

A useful starting point for exploring the academic-student relationship is a set of metaphors that Michael Bayles identified for professional-client relationships generally.[13] They are "paternalism", "agency", "contract", "friendship" and "fiduciary".[14]

There may be situations where the university teaching role is indeed **paternalistic**. The professor is in control; the student is passive in terms of any decisions (though, of course, the student may be actively learning). The likely conception of teaching-learning underlying this metaphor is of the simple transmission of knowledge and skills. This may necessitate lecturer

11 See, inter alia, L. Resnick ed., *Knowing, Learning and Instruction* (Hillsdale: Lawrence Erlbaum, 1989); S. Kift & G. Airo-Farulla, "Throwing Students in the Deep End, or Teaching Them How to Swim? Developing 'Offices' as a Technique of Law Teaching" (1992) 6(1) Legal Educ. Rev. 53; T. M. Duffy & D. J. Cunningham, "Constructivism: Implications for the design and delivery of instruction" in D. H. Jonassen ed., *Handbook of Research for Educational Communications and Technology*, (New York: Simon & Shuster Macmillan, 1996).

12 P. Ramsden, *supra* note 10 at 113.

13 This is not the appropriate occasion to discuss fully the extent to which academics should or should not be characterised as professionals. Applying the rather outdated "checklist" approach, academics do not match up to the traditional professions: there is no formal training or admissions process prior to becoming "academics"; no professional society for all academics; no code of professional ethics regulating the academic profession as a whole; and no professional disciplinary body ensuring that professional standards are maintained. Nevertheless, a more functional analysis would place academics within a cluster of professional occupations. See further W. J. Goode, "Encroachment, Charlatanism, and the Emerging Profession: Psychology, Sociology and Medicine" (1960) 25 Am. Sociology Rev. 902; E. Greenwood, "Attributes of a Profession" (1957) 2(3) Social Work 44; G. Millerson, *The Qualifying Associations* (London: RKP, 1964); R. Dingwall & P. Lewis, *The Sociology of the Professions* (London: Macmillan, 1983); E. Friedson, *Professionalism Reborn: Theory, Prophecy and Policy* (Chicago: University of Chicago Press, 1994); A. Witz, *Professions and Patriarchy* (London: Routledge, 1991); A O'Neill & L. V. Meek, "Academic Professionalism and the Self-Regulation of Performance" (1994) J. Tertiary Educational Administration 93; and P. Heyden, "Applying Client-Lawyer Models in Legal Education" (1997) 21 Leg. Stud. Forum 301.

14 M. Bayles, *Professional Ethics* (Belmont, Ca: Wadsworth Publishing Co, 1981).

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

However, just as lawyers may be tempted to "exploit and reinforce client dependency on the lawyer's specialized knowledge and technical skill,"[15] so a paternalistic style among academics may encourage or prolong intellectual 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.[16]

At the opposite extreme from paternalism is the metaphor of the academic as **agent** of the student. As "hired gun",[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 misrepresents the nature of higher education (as opposed, perhaps, to information provision):

> . . . [S]tudents can't just be given what they want. They don't passively consume their education: they actively co-produce it. Staff don't just feed them information. They challenge their thinking, engage them with ideas, assess their understanding, and ultimately decide whether to pass them or fail them. . . . [U]niversities aren't just service providers, but regulators and standard-setters.[18]

15 A. Alfieri, "Reconstructing Poverty Law Practice: Learning Lessons of Client Narrative" (1991) 100 Yale L.J. 2107 at 2132.

16 For a development of these ideas, see J. J. Mackinnon, *supra* note 1.

17 For a discussion of this metaphor as applicable in the legal profession, see M. Freeman, "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 Mich. L. Rev. 1469; T. Schneyer, "Some Sympathy for the Hired Gun" (1991) 41 J. Legal Educ. 11.

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 antidote 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,

George)" (2000) 22 J. Higher Educ Pol & Management 149 at 150. See also A. D'Amato, "The Decline and Fall of Law Teaching in the Age of Student Consumerism" (1987) 37 J. Legal Educ. 461.

19 S. V. Scott, "The Academic as Service Provider: is the customer 'always right'?" (1999) 21 J. Higher Educ. Policy & Management 193 at 201.

20 F. Rochford, *supra* note 4 at 34.

21 C. Fried, "The Lawyer as Friend" (1976) 85 Yale L.J. 1060.

undermine it. The friendship metaphor does not leave the academic with sufficient independence from the student.

Taking his metaphor straight from Equity, Bayles describes the **fiduciary** relationship as follows:

> [T]he 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]

22 Bayles, *supra* note 14, quoted in J. C. Callahan ed., *Ethical Issue in Professional Life* (New York: Oxford University Press, 1988) at 118 [emphasis in original].

23 Disappointingly, this is not done in R. P. Schuwerk, "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[24]

Bayles 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.[25] 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."[26]

ONLY mention of the professor/ academic as fiduciary is in the title. It remains in the realm of educational metaphor. See, however, H. G. Beh, "Student versus University: the University's Implied Obligations of Good Faith and Fair Dealing" (2000) 59 Md. L. Rev. 183, especially text accompanying footnote 92-5 (which identifies US cases rejecting a fiduciary analysis of the university/professor-student relationship). See also M. Astala, "Wronged by a Professor? Breach of Fiduciary Duty as a Remedy for Intellectual Property Infringement Cases" (2003) 3 Hous. Bus. & Tax L.J. 31 (which discusses US cases that have accepted that a fiduciary relationship arises between graduate students and supervising professors).

24 On the dangers of incorporating the metaphor into the law, see D. A. DeMott, "Beyond Metaphor: an Analysis of Fiduciary Obligation" (1988) Duke L.J. 879 at 880 foot note 3: "A metaphor, as a figure of speech, treats two dissimilar things as identical in order to call attention to their similarities . . . Using a technical legal term metaphorically is problematic when the connotations of the metaphorical use are at odds with the conclusions one would reach through analytical application of the relevant legal concept. For example, referring to a transaction as 'fraudulent' when key elements of any relevant statutory or common law definition of 'fraud' are missing is, in a technical context, a dubious usage."

25 Adopting dicta from Lord Woolf M. R. in *A-G* v. *Blake,* [1998] 1 All ER 833 at 842, the New Zealand Court of Appeal recognises that there is more than one category of fiduciary relationship attracting different kinds of fiduciary obligations: thus, a fiduciary obligation of confidentiality is distinct from the fiduciary obligations of loyalty and fidelity: *MacLean* v. *Arklow Investments Ltd,* [1998] 3 N.Z.L.R. 680 at 688 per Gault J., aff'd [2000] 2 NZLR 1, 1999 WL 1556536 (New Zealand P.C.). Furthermore, "No definition of what might constitute the essential element of a relationship giving rise to the fiduciary duties of loyalty and fidelity has found broad acceptance." *MacLean* v. *Arklow Investments Ltd, Ibid.* at 691, per Gault J.

26 *Liggett v. Kensington,* [1993] 1 N.Z.L.R. 257 at 267, rev'd [1995] 1 A.C. 74, 2 All E.R. 806.

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. Kuys*:

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

27 *Henderson* v. *Merrett Syndicates Ltd.* (1994), [1994] 2 Lloyd's Rep. 468, [1994] 3 All E.R. 506, [1994] 3 W.L.R. 761, [1995] 2 A.C. 145, 1994 WL 1060824 (U.K. H.L.).

28 *A-G* v. *Blake, supra* note 25 at 842.

29 See for example, L. S. Sealy, "Fiduciary Relationships" (1962) Cambridge L.J. 69; L. S. Sealy, "Some Principles of Fiduciary Obligation" (1963) Cambridge L.J. 119; Millett LJ., "Equity's Place in the Law of Commerce" (1998) 114 Law Q. Rev. 214; J. C. Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 Law Q. Rev. 51.

30 Law Commission, *Fiduciary Duties and Regulatory Rules.* Consultation Paper 124 (London: HMSO, 1992) at 28, where these categories of fiduciary are termed "status-based" and "fact-based". Finn similarly identifies a distinction between fiduciary duties based on a specified "legal relationship" and those based on a "factual phenomenon": P. Finn, "The Fiduciary Principle" in T. Youdan ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) at 32.

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.

32 *Bristol & West Building Society v. Mothew* (1996), [1997] 2 W.L.R. 436, [1996] 4 All E.R. 698, [1998] Ch. 1 (Eng. C.A.) [*Bristol & West Building Society v. Mathew* cited to Ch.].

33 [1973] 1 W.L.R. 1126, [1973] 2 All E.R. 1222, 1973 WL 39622 (New Zealand P.C.).

Secondly, there may be relationships which are not primarily "fiduciary" but within which specific fiduciary duties are imposed or assumed.[34] 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.[35]

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.[36] 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.[37]

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 WL 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.

35 *Laskin v. Bache & Co.* (1971), 1971 CarswellOnt 580, [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (Ont. C.A.) [my emphasis]. This opinion was reiterated by J. Dickson in *Guerin v. R.* (1984), [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, 1984 CarswellNat 813 (S.C.C.) [*Guerin* cited to S.C.R.] (S.C.C.). See similarly *Liggett v. Kensington, supra* note 26 at 267 per P. Cooke. See too in respect of the employment setting, *University of Nottingham v. Fishel*, [2000] I.R.L.R. 471, [2000] I.C.R. 1462, 2000 WL 281318 (Q.B.D.).

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

37 R. Flannigan, "The Fiduciary Obligation" (1989) 9 Oxford J. Legal Stud. 285 at 286.

Through identifying features which seem to match that conception, a *prima facie* case will then be made out for treating the academic-student relationship as giving rise to fiduciary obligations. There is little doubt that, in recent years, Canadian jurisprudence has developed the most inclusive or flexible conception of the fiduciary relationship.[38] For example, in *Frame v. Smith*, Wilson J. (albeit dissenting) presented an admirably simple account:

> Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[39]

The English courts are noticeably more restrictive in the scope granted to the fiduciary concept, as are the Australians to a slightly lesser extent. In the following passage, I believe that Justice Fisher has encapsulated the current New Zealand view of fiduciary obligations, which aligns closely with the Canadian position:

> For present purposes I take a duty to be fiduciary where it stems from an inequality of power brought about by the trust or confidence reposed in, and accepted by, one person ("the fiduciary") to perform some function on behalf of another ("the beneficiary") in a way which will best serve the interests of the beneficiary. Because the beneficiary lacks the opportunity or capacity to monitor loyalty during performance of the fiduciary's function, the law steps in to require it. If the fiduciary is shown to have failed to treat the beneficiary's interests as paramount there is held to have been a breach of fiduciary duty.

38 The Canadian courts have led the way in extending the scope of the fiduciary obligations to relationships between former directors/ senior executives and companies (*Canadian Aero Service Ltd. v. O'Malley* (1973), 1973 CarswellOnt 236, 1973 CarswellOnt 236F, [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206 (S.C.C.)); between the Crown and native peoples (*Guerin v. R., supra* note 35); between separated spouses (*Frame v. Smith, supra* note 8, though this was rejected by the majority); between companies contemplating joint ventures (*International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, 69 O.R. (2d) 287, 1989 CarswellOnt 126 (S.C.C.)); between doctor and patient (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 449, 1992 CarswellBC 155 additional reasons at EYB 1992-67037, 1992 CarswellBC 338, 1992 CarswellBC 908, [1992] 2 S.C.R. 318, 74 B.C.L.R. (2d) 2, [1992] 6 W.W.R. 673 (S.C.C.)); and between parent and child (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, 1992 CarswellOnt 841 (S.C.C.).

39 *Frame* v. *Smith, Ibid.* at 99.

> "Fiduciary duty" in that sense has sometimes been referred to as a "duty of loyalty".[40]

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,[41] 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", Millett L.J. then breaks this down into "several facets" in the leading English case, *Bristol & West Building Society v. Mothew*.[42]

(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*.[43]

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:

40 *BNZ v. NZ Guardian Trust Co*, [1999] 1 N.Z.L.R. 213 at 246 per J. Fisher (aff'd in [1999] 1 N.Z.L.R. 664 CA), refining the definition in *Cook v. Evatt*, [1992] 1 N.Z.L.R. 676 (New Zealand H.C.).

41 *Ibid.* See text accompanying footnotes 71–75.

42 *Bristol & West Building Society v. Mothew*, *supra* note 32 at 18 per Millett LJ. The passage is reproduced *infra* note 76.

43 *Guerin*, *supra* note 35 at 384.

44 *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 156 C.L.R. 41, 55 A.L.R. 417, 58 A.L.J.R. 587, 1984 WL 440670 (Australia H.C.).

> [A fiduciary relationship is] one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.[45]

It is my contention that a student is doubly disadvantaged in terms of relative power within the academic relationship. Firstly, like the lawyer, the academic has a special knowledge and set of skills. Possession of them in itself gives the academic considerable power. The student is dependent on the academic to both utilize and share that knowledge (and, of course, a reason for the relationship is precisely to transfer at least part of that knowledge to the student). Secondly the academic is given power to determine—through evaluating the student's performance in examinations and assessments—whether the purpose of the relationship has succeeded, and the student has achieved the requisite standard of knowledge and skills. This power, although not absolute in that it is subject to the concurrence of other academics (and nowadays is usually constrained by the setting out in advance of the standards to be met), still involves significant discretion. A student is thus vulnerable to the use or abuse of that discretionary power.

Psychiatrist Alan Stone provides a fuller account of the power relationship:

> Power has been studied as it develops in group interaction and—translating that research into the law school setting—can be understood as derived from five distinguishable but related bases:
>
> - reward power, based on the professor's ability to disperse rewards in the form of high grades, desirable clerkships, letters of reference, etc.;
> - coercive power, based on the professor's ability to give low grades and damage future professional opportunity;
> - legitimate power, based on the normative perception that the professor has a right to prescribe behavior;
> - referent power, based on the students' psychological identification with the professor as someone they would like to emulate;
> - expert power, based on the perception that the professor has some special capacity to induce new and useful cognitive structures.
>
> These five bases of power . . . give the professor enormous potential to inflict harm on his students.[46]

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.

46 A. Stone, "Legal Education on the Couch" (1971) 85 Harv L. Rev. 392 at 411–12.

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.[47] 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."[48]

Thus the fears of Ian Kennedy[49]—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.

47 Hyams writes, "It was, apparently, originally thought that the relationship between a student and a university was subject to the doctrine indicated by the phrase *in loco parentis*. The best view (. . .) is that the doctrine does not affect the relationship between a student and a university." Hyams, *supra* note 4 at 527–528.

48 *Goldsworthy v. Brickell* (1986), [1987] 1 Ch. 378, [1987] 1 All E.R. 853, [1987] 2 W.L.R. 133 (Eng. C.A.) at 868 [All E.R.] per Nourse LJ.

49 "By beginning from a premise of duty, the fiduciary relationship preserves the traditional, profession-oriented approach which sees the doctor as the principal arbiter of the patient's needs, albeit subject to a significantly higher standard of care. . . . And worse, it gives greater legal validity to the doctor as the one who determines best interests by describing her as a fiduciary, one to be trusted!", I. Kennedy, "The Fiduciary Relationship and its Application to Doctors and Patients" in P. Birks ed., *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon, 1996) at 137–139. For a contrasting view of the doctor as fiduciary see A. Grubb, "The Doctor as Fiduciary" (1994) 47 Curr. Legal Probs. 311 at 340: ". . .the time may have come . . . to reappraise the doctor-patient relationship and recognise the doctor as a fiduciary".

(ii) Paramountcy 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."[50]

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.[51]

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.[52] 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,[53] the student has the knowledge to evaluate the effectiveness of the teaching and learning process only after it

50 P. Finn, "The Fiduciary Principle" in T. Youdan ed., *supra* note 30 at 46.

51 A. Burrows, "We Do This At Common Law But That In Equity" (2002) 22 Oxford J. Legal Stud. 1 at 8.

52 That the beneficiary relied on the fiduciary for information and that the transaction was important in the lives of the beneficiaries were treated as significant in establishing that a fiduciary obligation existed in *Coleman* v. *Myers, supra* note 34.

53 See A. Goldsmith, "Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers" (1996–1997) 14 J. of Prof. Legal Educ. 1.

has occurred. Until then, he or she will have to take on trust that the methodology and content of the teaching are beneficial.[54] It is this facet 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.[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.,[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. Bethlem Royal Hospital Governors*:[57]

> Counsel for the appellant referred to *Nocton* v. *Lord Ashburton* [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]nshackling the fiduciary principle from property trust law to roam through commercial and professional relationships has been

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, "Paternalism and the Legal Profession" (1981) Wis. L. Rev. 454 at 467–474.

55 L. Smith, "The Motive, Not the Deed" in J. Getzler ed., *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexisUK, 2003).

56 *Supra* note 40.

57 *Sidaway v. Bethlem Royal Hospital Governors*, 61 N.R. 51, [1985] 1 All E.R. 643, [1985] A.C. 871 at 886, [1985] 2 W.L.R. 480, 1985 WL 311459 (U.K. H.L.).

criticized as making the whole concept unrecognisable."[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."[59]

If it is appropriate to synthesize undue influence cases into the fiduciary concept,[60] then there is English support too for a broader view.[61] Certainly this line of reasoning has found favour with Canadian judges[62] and academics.[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?"[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

58 L. Hoyano, "The Flight to the Fiduciary Haven" in P. Birks ed., *Privacy and Loyalty* (Oxford: Clarendon, 1997).

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.

60 Such an approach is supported by Millett LJ., "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.

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

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.

63 E.g. Hoyano, *supra* note 58 and R. Flannigan, *supra* note 37.

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.

65 McLachlin J. in *Norberg* v. *Wynrib*, *supra* note 38.

66 E.W. Thomas, "An Affirmation of the Fiduciary Principle" (1996) N.Z.L.J. 405 at 406.

67 *Duncan v. Medical Practitioners Disciplinary Committee*, [1986] 1 N.Z.L.R. 513 at 521, [1986] B.C.L. 1580, 1986 WL 706519, (identifying the doctor-patient relationship as fiduciary); *H v. R*, [1996] 1 N.Z.L.R. 299 (New Zealand H.C.) (a sexual abuse case).

68 *Supra* note 57.

69 The House of Lords in *Reading v. R.*, [1951] AC 507, [1951] 1 All E.R. 617 (Eng. H.L.) certainly seemed open to the broader approach.

(d) The Constituent Fiduciary Obligations

It is common to reduce fiduciary duties to only two, both of which are proscriptive 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 proscriptive 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 proscriptive 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

70 G. Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, 2nd ed. (North Ryde: LBC, 2001) at 148. See, too, G. Dal Pont & D. Chalmers, *Equity and Trusts in Australia and New Zealand* 2nd ed. (North Ryde: LBC, 2000) at chap. 4; and D. Hayton, "Fiduciaries in Context: An Overview" in P. Birks ed., *supra* note 58.

71 R.P. Austin, "Moulding the Content of Fiduciary Duties" in A.J. Oakley, *Trends in Contemporary Trust Law* (Oxford: OUP, 1996) at 156.

72 *Bristol & West Building Society v. Mothew*, *supra* note 32 at 18 per Millett LJ; *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 Trust L. Intl'l 34.

73 See *McKaskell v. Benseman*, *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.

75 Millett LJ, *supra* note 29; R. Flannigan, *supra* note 37.

> 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 Own[78]

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.*

78 For examples of such conduct see M. Freedman, "The Professional Responsibility of the Law Professor: Three Neglected Questions" (1986) 39 Vand. L. Rev. 275 at 280–281. For discussion of US cases where the courts seem to be moving towards granting remedies for breach of fiduciary obligations in these circumstances see Astala, *supra* note 23. For discussion of the mirror duty of students not to exploit the lecture setting by publishing lecture notes, see P. Finn, *supra* note 74 at 151.

(where the student apparently consented).[79] A breach could take the form of using students' research without consent or acknowledgment, or taking credit as joint author of a publication written or researched by the student alone. Any consent apparently given may be invalidated by the existence of the significant power imbalance in the relationship.

This is a situation that is not pushing the bounds of existing case law very far, since the interests involved are (potentially) proprietary or commercial. However, an equitable remedy will be granted only if there is no other remedy available in law.[80]

(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.[81]

> 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.[82]

However if the transaction is at arm's length and open, then it may be treated as a legitimate commercial transaction.[83] 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 debateable, but as P. Finn puts it, "[p]erhaps 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".

82 *Regal (Hastings) Ltd. v. Gulliver* (1942), [1942] 1 All E.R. 378 at 386, [1967] 2 A.C. 134, 1942 WL 12815 (U.K. H.L.) per Lord Russell of Killowen. See also *Keech v. Sandford* (1726), 2 Eq. Ca. Abr. 741, Sel. Cas. Ch. 61, 22 E.R. 629, 25 E.R. 223 (Eng. Ch. Div.); *Reading v. A-G*, *supra* note 69; *Phipps v. Boardman* (1966), [1967] 2 A.C. 46, [1966] 3 All E.R. 721, 1966 WL 22121 (U.K. H.L.); and *A-G for Hong Kong v. Reid*, [1993] H.K.L.Y. 539 Privy Council, [1993] 3 W.L.R. 1143, 1993 WL 1482178.

83 *Queensland Mines Ltd v. Hudson*, [1978] A.L.R. 1, 52 A.L.J.R. 399 (Australia P.C.), in

(c) A Duty Not to Favour One Student Over Another

A fiduciary is not prohibited from "serving two masters".[84] 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"[86] 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.[87]

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

declining to follow *Regal (Hastings)* opens up defences such as bona fides (which would in this situation raise questions about the relevance of the book as a required text).

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. *Mothew*, *supra* note 32 at 19 per Millett LJ.

opportunity and only advises some of its customers of the opportunity, it will be in breach of its duty" [to the others].[88]

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 loyally as possible on behalf of each person subject to her authority.[89]

While this suggestion has its attractions, importing other concepts such as fairness into the fiduciary relationship seems unnecessary.[90] 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.

(d) 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, ie, not to use the trust of the client to the client's disadvantage.[91]

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

88 Law Commission, *Fiduciary Duties and Regulatory Rule*, *supra* note 30 at 35.

89 E. Fox-Decent, "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's L.J. 259 at 267–268.

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 Professionnal Responsability, *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.[92] 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".[93]

(e) 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*[94] and *Boyce v. Mouat*.[95] 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:

92 *Norberg* v. *Wynrib*, *supra* note 38, relating to the doctor-patient relationship. For a useful discussion in relation to the lawyer-client relationship, see W. K. Shirey, "Dealing with the Profession's 'Dirty Little Secret': A Proposal for Regulating Attorney-Client Sexual Relations" (1999) 13 Geo. J. Legal Ethics 131. This should be seen as separate from sexual harassment.

93 D. Hayton, *supra* note 70 at 292.

94 *Supra* note 9.

95 (1993), [1994] 1 A.C. 428, 159 N.R. 311, [1993] 4 All E.R. 268 (New Zealand P.C.).

> 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.[96]

The provision of feedback on progress may be seen as an incident of the teaching contract (or of a duty to teach competently):[97] 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.[98] 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.[99] 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.

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 Harpum raises the possibility that there remains a further relevant constraint, namely that the fiduciary is unable to delegate his or her powers: C. Harpum, "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 express 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

100 *Coomber, Re*, [1911] 1 Ch 723, 1911 WL 15658 (Eng. C.A.) at 728–729 [Ch].

> question, communal or otherwise. The essence of the fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. . . . In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.[101]

Seen in this light, the academic has little to fear from being viewed as a fiduciary, either in the metaphorical sense or in the legal sense. All that the concept adds up to is what otherwise might be seen as "best practice" or "professionalism".

In rejecting the fiduciary concept vis-à-vis doctors, Kennedy concludes that "[a] legal framework which merely invites doctors to walk on eggs is hardly the way forward."[102] However what is wanted of the academic is a self-reflective practitioner, not someone who unthinkingly treats the student as a passive receptor of wisdom, nor a cold contractarian. The claim I am making is that it will be beneficial to the purposes of the academic-student relationship if the academic assumes the role and responsibilities of a fiduciary. I see no reason why law teachers should have fewer or lesser obligations toward their students than lawyers have toward their clients. Indeed, because of transformative nature of education, and the dual role of the lecturer as teacher and examiner, the power differential may be more marked, and the scope for abuse as extensive, in the case of the student-academic relationship.

The legal profession has, of course, adopted codes of conduct to assist in the management of fiduciary obligations (and much more besides). In a similar way, academics might anticipate and avoid behaviour that could give rise to claims of breaches of fiduciary duties towards students if they "professionalized" themselves at least in this respect. While individual universities have drawn up various codes of conduct for staff, there could be advantages in academics as a whole, or discipline-specific groups of academics, ensuring that guidance is available to academics which incorporates their "fiduciary" obligations to students.

> Even if the codes only repeated the standards contained in the general law they would be more accessible and provide a more practical basis for profes-

101 *Canson Enterprises Ltd. v. Boughton & Co.* (1991), [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129 at 154, 1991 CarswellBC 269 (S.C.C.). See also *Maclean v. Arklow Investments Ltd, supra* note 25. In a development of this idea, Canadian academic Lionel Smith has argued that the value of the fiduciary concept lies in monitoring motives as much as actions: L. Smith, "The Motive, Not the Deed" in J. Getzler, *supra* note 55.

102 I. Kennedy, *supra* note 49 at 140.

> 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 imprimateur 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.

103 R. Cranston, *Legal Ethics and Professional Responsibility* (Oxford: Clarendon, 1995) at 4. This is not to suggest that such codes are unproblematic: see W. Thompson, "Rules of Professional Conduct" (1995) N.Z.L.J. 128; and G. Dal Pont, "What are Rules of Professional Conduct for?" (1996) N.Z.L.J. 254.