BANKS, ADVICE-GIVING AND FIDUCIARY OBLIGATION

*M.H. Ogilvie**

I. INTRODUCTION**

Like negligence, the categories of fiduciary relationships are not closed.[1] Indeed, the fiduciary concept has enjoyed a remarkable renaissance in the second half of the twentieth century, perhaps unexpectedly, given its banishment to the legal darkness when modern trust law was formalized in the eighteenth and early nineteenth centuries. Banking law, which has quietly resisted some of the significant changes in private law over the past twenty years, has now been ensnared in the spreading net of the "law of fiduciaries". The Ontario High Court has recently considered for the first time the question of whether a banker owes a fiduciary duty to a customer when giving investment advice. In *McBean v. Bank of Nova Scotia*[2] and *Hayward v. Bank of Nova Scotia*,[3] the two exotic cow cases, the Court found that a fiduciary duty was owed when giving investment advice. However, in *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce*,[4] the Court

* Department of Law, Carleton University.

** Since the completion of this article the Ontario Court of Appeal has upheld the decision of Potts J. in *Hayward v. Bank of Nova Scotia* in an unreported decision released on 6 Jun. 1985.

Writing for the Court, Houlden J.A. stated that while the Court of Appeal might have interpreted the facts differently, it agreed that the bank was in breach of a fiduciary obligation because it had not made full disclosure. Significantly, the Court stated that the trial judge had erred in finding that the parties' unequal bargaining position formed the basis for the imposition of a fiduciary duty. Instead, the Court firmly based its decision on the existence of a fiduciary relationship and its breach. On a first reading the brief decision of the Court of Appeal provokes no need to re-evaluate the theoretical sections of this article.

[1] Laskin v. Bache & Co., [1972] 1 O.R. 465, at 472, 23 D.L.R. (3d) 385, at 392 (C.A. 1971) (Arnup J.A.): "In my opinion the category of cases in which fiduciary duties and obligations 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." *See also* Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, at 7 (1975): "Like the categories of negligence, the categories of fiduciary should not be considered closed."

[2] 15 B.L.R. 296 (Ont. H.C. 1981), *aff'd* 17 A.C.W.S. (2d) 154 (C.A. 1982). The brief decision given by Arnup J.A. has not been reported.

[3] 45 O.R. (2d) 542, 7 D.L.R. (4th) 135 (Ont. H.C. 1984), *aff'd* (not yet reported, Ont. C.A., 6 Jun. 1985).

[4] 24 B.L.R. 1, 5 D.L.R. (4th) 452 (Ont. H.C. 1983).

held that, on the facts, no such duty was owed to caution prospective investors about an investment possibility.

On closer examination, these decisions reveal considerable uncertainty about the nature of the legal duty imported into the banker-customer relationship. In the first exotic cow case, *McBean,* Carruthers J. began his judgment with the somewhat jaunty remark that, "[t]his action can be described as being of the type now commonly referred to as a '*Hedley Byrne*' ".[5] In one sense, perhaps unwittingly, the comment is ironic. Until recently, the courts appear to have overlooked the fact that the most important "private obligations" case since *Donoghue v. Stevenson*[6] involved banking law. Yet, the implications of *Hedley Byrne & Co. v. Heller & Partners Ltd.*[7] with respect to banking law remain to be explored. At the same time, Carruthers J.'s observation is misleading. *McBean* (as well as *Hayward*) is not merely, nor perhaps at all, a "*Hedley Byrne*"; rather, it is a case involving the importation of a fiduciary duty into the banker-customer relationship, a fundamental change in the legal nature of that relationship.

This confusion about the difference between fiduciary obligation and negligent misrepresentation indicates that the precise doctrinal nature of a banker's fiduciary duty to his customer is unclear. In all three cases, similar yet distinct legal notions or some combination of these notions are invoked to explain the substantive content and practical operation of the fiduciary concept: undue influence, unequal bargaining power, unconscionability, conflict of interest and negligent misrepresentation. Why have three different High Court judges had such difficulty in formulating the precise nature of a banker's fiduciary duty? At least three reasons extrinsic to the cases themselves may be suggested.

First, it appeared to have been settled as long ago as 1848[8] that the banker-customer relationship was purely one of debtor-creditor and excluded any element of trusteeship or fiduciary obligation. Once a customer had deposited money, the banker was as free to use it as any other debtor. His sole obligation was to return to the customer on demand the deposited sum with any interest. It may be that the denial of a fiduciary relationship by the House of Lords in the context of the deposit-taking business of banks has precluded investigation by subsequent courts of possible fiduciary obligations in relation to other aspects of banking business. Only recently have the courts been willing to find that a banker may be a constructive trustee of a corporate

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[5] *Supra* note 2, at 297-98.

[6] [1932] A.C. 562 (H.L. Sc.).

[7] [1964] A.C. 465 (H.L. 1963).

[8] Foley v. Hill, 2 H.L. Cas. 28 (1848). *See* Thermo King Corp. v. Provincial Bank of Canada, 34 O.R. (2d) 369, 130 D.L.R. (3d) 256 (C.A. 1981), *leave to appeal denied* 42 N.R. 352 (S.C.C. 1982); Joachimson v. Swiss Bank Corp., [1921] 3 K.B. 110 (C.A.).

customer's money in certain circumstances[9] and even more recently the courts have decided that a fiduciary duty is owed when giving investment advice.[10] Thus, it is premature to expect a complete or articulate doctrine of fiduciary duty in the banker-customer context.

Secondly, it would be inappropriate to criticize the Ontario High Court too severely for failing to articulate a precise and useful definition of the fiduciary duty in the banker-customer relationship because the general notion of fiduciary duty has not yet been fully explored. Although its use is increasing in the common law, the concept is imprecise and always will be. The modern "law of fiduciaries" generally, and not merely its application in banking law, is in its formative stage.[11]

Thirdly, Canadian courts have never faced squarely the legal problems posed by bankers giving investment advice. Section 174 of the *Bank Act*[12] lists the activities statutorily prohibited to banks. It is not clear whether the informal business and investment advice given by managers and other officers in both rural and urban branches is prohibited by this section. Rather, one could argue that the parts of section 174 relating specifically to investment matters are intended to prevent banks from competing with trust companies, insurance companies and securities brokerages that actively engage in investment counselling, portfolio management and the administration of trusts. It is also not clear from the case law whether banks may engage in advice-giving as a part of the general business of banking within the meaning

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[9] Barclays Bank v. Quitclose Inv., [1968] 3 All E.R. 651 (H.L.); Karak Rubber Co. v. Burden, [1971] 3 All E.R. 1118 (Ch. D.); Selangor United Rubber Estates Ltd. v. Cradock, [1968] 3 All E.R. 1073 (Ch. D.).

[10] *Supra* notes 2-4.

[11] The most important academic writing in this field includes: P.D. FINN, FIDUCIARY OBLIGATIONS (1977); J. SHEPHERD, THE LAW OF FIDUCIARIES (1981); Brown, *Franchising — A Fiduciary Relationship*, 49 TEX. L. REV. 650 (1971); Goodman, Herman, & Blidner, *Conflicts of Interest, Trust Companies and the Chinese Wall*, 9 CAN. BUS. L.J. 435 (1984); Jones, *Unjust Enrichment and the Fiduciary's Duty of Loyalty*, 84 L.Q.R. 472 (1968); McClean, *The Theoretical Basis of the Trustee's Duty of Loyalty*, 7 ALTA. L. REV. 218 (1969); Rogers & Young; *Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975); Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539 (1949); Sealy, *Some Principles of Fiduciary Obligation*, [1963] CAMB. L.J. 119; Sealy, *Fiduciary Relationships*, [1962] CAMB. L.J. 69; Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q.R. 51 (1981); Talbott, *Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies*, 20 OHIO ST. L.J. 320 (1959); Weinrib, *supra* note 1; Winder, *Undue Influence and Fiduciary Relationship*, 4 CONV. (N.S.) 274 (1940); Wolinsky & Econome, *Seduction in Wonderland: The Need for a Seller's Fiduciary Duty Toward Children*, 4 HASTINGS CONST. L.Q. 249 (1977). The concept of fiduciary duty has also been explored in relation to oil and gas law: *Fiduciary Duties in Oil and Gas Transactions*, 3 ALTA. L. REV. 333 (1964); MacWilliam, *Fiduciary Relationships in Oil and Gas Joint Ventures*, 8 ALTA. L. REV. 233 (1970); Pellat, *The Fiduciary Duty in Oil and Gas Joint Operating Agreements — Midcon Re-examined*, 3 U.B.C.L. REV. 190 (1968).

[12] *Bank Act*, S.C. 1980-81-82-83, c. 40.

of subsection 173(1) or its predecessor sections.[13] In some cases where negligent advice has been given, the courts have found that the banks were not liable because the advice in question was not within the scope of the particular manager's authority.[14] In other cases the bank was not responsible for the customer's loss because the transaction offended some other section of the then current *Bank Act*.[15] Today, neither of these escape routes is available to a defendant bank. The *Bank Act* has incorporated the "indoor management" rule into the law of banking[16] and no act of a bank is deemed to be invalid simply because it is contrary to the Act.[17] A bank is estopped, therefore, by both statute and common law from invoking its own illegality as a defence.

It is well known that bankers counsel customers in general business matters. Indeed, banks aggressively advertise themselves as competent and willing advisors. Thus, there can be little doubt that investment counselling, particularly to small customers, falls squarely within banking business under subsection 173(1) of the *Bank Act*. Judicial interpretation of this subsection and its predecessor sections has favoured a liberal interpretation of the words "generally as appertains to the business of banking", one which includes those activities which the business world generally regards as being legitimate banking concerns.[18] In any event, banks which hold themselves out to the public as offering business advice can hardly be heard to argue otherwise should the advice prove to be erroneous.[19] Therefore, there would appear to be good reason today for the courts to eschew their historical hesitation in order to explore more fully the duties owed by bankers to their customers.

A start has been made. However, as suggested earlier, close analysis of recent decisions reveals imprecision in the formulation of the content of the fiduciary obligation. The purpose of this paper is threefold: first, to analyze these cases with a view to discerning current curial perceptions of the fiduciary duty owed by bankers to customers; secondly, to show that the misuse of legal precedent has created difficulties in formulating

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[13] *E.g.*, *Bank Act*, S.C. 1966-67, c. 87, para. 75(1)(e).

[14] Banbury v. Bank of Montreal, [1918] A.C. 626 (H.L.). *See also* McIntyre v. Bank of Montreal, 22 W.W.R. 379, 10 D.L.R. (2d) 288 (Man. Q.B. 1957); Carr v. Bank of Montreal, 63 O.L.R. 544, [1929] 3 D.L.R. 54 (H.C.).

[15] Royal Bank of Canada v. Mack, [1932] S.C.R. 488, [1932] 1 D.L.R. 753; Mutual Mortgage Corp. v. Bank of Montreal, 53 W.W.R. 724, 55 D.L.R. (2d) 164 (B.C.C.A. 1965).

[16] S.C. 1980-81-82-83, c. 40, s. 21.

[17] S. 20.

[18] *See generally* Canadian Pioneer Management Ltd. v. Saskatchewan Lab. Rel. Bd., [1980] S.C.R. 433, 107 D.L.R. (3d) 1 (1979); Central Computer Servs. v. Toronto Dominion Bank, 1 Man. R. (2d) 402, 107 D.L.R. (3d) 88 (C.A. 1979); Provincial Treasurer of Alberta v. Long, 49 D.L.R. (3d) 695 (Alta. S.C. 1973); Tennant v. Union Bank, [1894] A.C. 31 (P.C. 1892); Jones v. Imperial Bank of Canada, 23 Gr. 262 (Ch. 1876).

[19] Arguably, this would be supported by section 20 of the *Bank Act*, S.C. 1980-81-82-83, c. 40.

a substantive content for fiduciary obligation in advice-giving; thirdly, to distinguish in a preliminary fashion the elements which may ultimately comprise the doctrinal basis of a substantive fiduciary obligation in the banker-customer relationship and to ask whether the fiduciary obligation approach is the most appropriate in advice-giving situations.

At the outset, two self-imposed limitations should be noted. First, the discussion purports to be exploratory in nature only, not definitive. Secondly, the discussion will be limited to the situation in which bank branch managers or officers give advice to valued customers. Consideration will not be given to the complex problems associated with the sophisticated investment counselling and portfolio management conducted by trust companies, other near-banks and banks in other countries. There is already considerable literature devoted to the so-called "Chinese Wall" response to these conflict of interest issues.[20]

II. THE CASES

Whereas *McBean* and *Hayward* dealt with a banker's fiduciary duty when giving advice, *Standard* considered what fiduciary duty is owed when a banker fails to give investment advice. Whether, in the final analysis, the distinction between act and omission is significant in the advice-giving context remains to be seen.[21] However, it provides a convenient rationale for separating the discussion of *McBean* and *Hayward* from that of *Standard.* In addition, the exotic cow cases are discussed together because they involve almost identical fact situations.

A. *McBean and Hayward*

Mrs. McBean and Mrs. Hayward were elderly widows and friends with small annual incomes and no knowledge of the exotic cow business. In *Hayward,* Potts J. described the business thus: "Breeds like Maine-Anjou and Meuse-Rhine Ijssel were hormonally stimulated to produce multiple eggs. After impregnation, the fertilized eggs were surgically removed and implanted in an ordinary recipient cow. In the exotic cow market, the calves commanded a high price and, as long as the market held, profitability of the venture was dependent on rapid production

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20 Goodman, Herman & Blidner, *supra* note 11; Herzel & Colling, *The Chinese Wall and Conflict of Interest in Banks,* 34 BUS. LAW 73 (1978); Huck, *The Fatal Lure of the "Impermeable Chinese Wall",* 94 BANKING L.J. 100 (1977); Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Security Firms,* 50 N.Y.U.L. REV. 459 (1975); Mendez-Penate, *The Bank "Chinese Wall": Resolving and Contending with Conflicts of Duties,* 93 BANKING L.J. 674 (1976).

21 For an interesting recent discussion of the law with respect to acts and omissions *see* J.C. SMITH, LIABILITY IN NEGLIGENCE (1984).

of exotic calves."[22] In 1975 both women were approached by Poland, a cattle broker, who suggested that they purchase one cow each for the sum of $30,000. In order to purchase their respective cows, Mrs. McBean and Mrs. Hayward were obliged to secure loans from their local branch of the Bank of Nova Scotia, managed by Dunnell. Both women discussed the investment with Dunnell and their loan applications were quickly finalized. During the following months, after further discussions with Dunnell, the women each secured two additional loans of $21,500 to purchase four more cows. Within a year Poland had declared bankruptcy.

Both trial judges found that Dunnell had actively encouraged Mrs. McBean and Mrs. Hayward to take the loans in order to invest in the business. He had prepared financial projections which included profit estimates for investors and had assured them that the investment was "a good deal" and "a good investment". He had not informed them that Poland was deeply indebted to the Bank in 1975, that the Bank's regional office was not confident about the prospects of the exotic cow business generally nor of Poland's venture specifically and that the regional office was urging caution in extending loans to investors in the field. Both judges found that the two women had deliberately sought investment advice from Dunnell and that his advice had determined their decisions to invest.

In *McBean*, the Bank of Nova Scotia attempted to resist liability for Dunnell's poor advice by arguing that neither the Bank nor any of its managers were in the business of giving financial advice. Carruthers J. declined to accept this outdated argument for two reasons: first, Mrs. McBean's passbook contained wording which encouraged customers to seek financial advice from a local bank manager, who was said to have years of practical business experience and knowledge which a customer could tap; secondly, having agreed to give advice, Dunnell was automatically in the business of so doing. The latter reason also provided the basis for the existence of a legal relationship between Mrs. McBean and the Bank.[23]

Although Carruthers J. had found a reliance-based relationship between the banker and his customer, he proceeded to apply *Woods v. Martins Bank Ltd.*[24] He decided that the relationship was fiduciary, that Dunnell was obliged to make full disclosure of Poland's financial position to Mrs. McBean once he decided to give investment advice

[22] *Supra* note 3, at 301, 7 D.L.R. (4th) at 136-137.

[23] *Supra* note 2, at 303 (Carruthers J.):

Whether that wording was seen by the plaintiff at any time, and it probably was not, I have found that the plaintiff sought this type of advice from the defendant Dunnell and he agreed to give it. It should go without saying that the relationship between customer and bank manager must allow for this type of dealing if the bank manager agrees to become involved.

[24] [1959] 1 Q.B. 55 (1958).

and that Dunnell owed a duty of reasonable skill and care in giving such advice. Furthermore, he held that given Dunnell's failure to take care, Mrs. McBean was entitled to be returned to the position she was in prior to entering the transactions and to receive interest as well as out-of-pocket expenses.

McBean has been greeted as an important case because it imported a fiduciary obligation into the banker-customer relationship, at least with respect to investment advice-giving. Yet, there are a number of disconcerting features about Carruthers J.'s analysis, most of which stem from his simple application of *Woods*, a case which pre-dated *Hedley Byrne* and in which elements of fiduciary obligation, negligent misrepresentation and restitution were commingled. The resurrection of *Woods* is itself surprising, not only because Salmon J.'s decision was riven with substantive legal problems, but also because it would appear to have been superseded by subsequent developments. In Canada, *Woods* appears to have been cited only once in a banking law case. The British Columbia Court of Appeal in *Mutual Mortgage Corp. v. Bank of Montreal*[25] found that the Bank was not liable for the plaintiff's loss. The fiduciary aspect of *Woods* was not applied, rather *Mutual* was viewed by the majority to be a case about negligent misrepresentation. A modern reading of the decision suggests that the Court of Appeal was struggling, perhaps unsuccessfully, to understand the impact of the then novel *Hedley Byrne* and that *Woods* was simply mentioned in passing.[26] *Woods* has not merited notice in either of the two Canadian texts on banking law, Falconbridge[27] or Baxter.[28]

It cannot be said that *Woods* has fared better in England. Although discussed at several places in Paget,[29] the fiduciary relationship aspect of the case has had little impact, if any, on the case law. The decision does not appear to have been applied in any subsequent case and to have provoked discussion only in *Hedley Byrne*. Lord Hodson opined that Salmon J. had put a strained interpretation on the word "fiduciary" and that the case was really about a "special relationship".[30] Lord Devlin thought that *Woods* was a case about a "relationship equivalent to contract" in which a duty of care arose once the existence of the relationship was proven.[31] Lord Pearce simply stated that on its facts *Woods* was rightly decided.[32] In short, three of the five Law Lords who

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25 *Supra* note 15.

26 *Id.* at 733, 55 D.L.R. (2d) at 172-73.

27 FALCONBRIDGE ON BANKING AND BILLS OF EXCHANGE (7th ed. A. Rogers 1969).

28 I. BAXTER, THE LAW OF BANKING (3d ed. 1981).

29 PAGET'S LAW OF BANKING 13-14, 70, 73, 161-63, 165-67, 259 (9th ed. M. Megrah & F. Ryder 1982).

30 *Supra* note 7, at 511, 514.

31 *Id.* at 530.

32 *Id.* at 539.

mentioned *Woods* approved of the decision, but only after diluting the fiduciary obligation on which the judgment was founded.

Writing in 1963 just before *Hedley Byrne*, Professor Sealy commented[33] that there had been only two successful English cases in the twentieth century in which a fiduciary had been held liable for negligently given investment advice: *Woods* and *Nocton v. Lord Ashburton.*[34] But for *McBean* and *Hayward* that statement would still stand. Prior to *Hedley Byrne*, liability for negligent advice could only arise in two situations, in contract (usually implied) and in the then recognized categories of fiduciary obligation. *Hedley Byrne* added the third possibility of liability in tort. Although the Law Lords originally confined liability for negligent misrepresentation to "special relationships", *Esso Petroleum Co. v. Mardon*[35] has now indicated that liability may arise whenever there is both advice-giving and detrimental reliance. If not for *McBean* and *Hayward*, one might have thought that *Hedley Byrne* and the *Hedley Byrne* cases had superseded the earlier fiduciary relationship cases. Thus, at least in England, subsequent banking law cases involving advice-giving have indeed been seen as "*Hedley Byrne's*".[36]

The rediscovery of *Woods* raises many questions not only about the actual decision itself but also about its wider relevance since *Hedley Byrne.* Why should a fiduciary relationship arise in the banker-customer relationship? What is the substantive content of the fiduciary relationship? What standard of care does a banker owe as a fiduciary? Is it reasonable care, a duty of full disclosure or some other standard? What remedies flow from the breach of a fiduciary duty? Do the remedies include restitution? Is *McBean* really a "*Hedley Byrne*"? Is a fiduciary duty necessary after *Hedley Byrne*?

A second perplexing feature of the *McBean* decision is Carruthers J.'s holding that while Dunnell could decline to give any advice at all, once he decided to do so he was obliged to disclose "all of the facts and all of the circumstances . . . which reasonably could be said to bear on the question of 'invest or not' ".[37] No reference is made to the fact that such disclosure would conflict with the duty of confidentiality owed by the Bank to Poland, a duty which has long been implied by law into the banker and customer contract.[38] This lacuna is significant

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33 Sealy, *Some Principles of Fiduciary Obligation, supra* note 11, at 137.

34 [1914] A.C. 932 (H.L.). This case was concerned with advice given by a solicitor.

35 [1976] 2 All E.R. 5 (C.A.).

36 Box v. Midland Bank, [1979] 2 Lloyd's Rep. 391 (Q.B. 1978), *rev'd on other grounds* [1981] 1 Lloyd's Rep. 434 (C.A. 1980).

37 *Supra* note 2, at 304.

38 Guertin v. Royal Bank of Canada, 43 O.R. (2d) 363, 1 D.L.R. (4th) 68 (H.C. 1983), *aff'd* 47 O.R. (2d) 799 (C.A. 1984); Haughton v. Haughton, [1965] 1 O.R. 481 (H.C. 1964); Tournier v. National Prov. and Union Bank of England, [1924] 1 K.B. 461 (C.A. 1923).

not only because Carruthers J.'s analysis is clearly wrong when viewed from Dunnell's perspective, but also because it underlines the conflict of interest that arises when a bank undertakes to advise one customer to invest in another customer's enterprise. Again, the legal nature of a banker's relationship to his customer is called into question.

Not surprisingly, Potts J. applied both *McBean* and *Woods* in *Hayward* and found that the Bank of Nova Scotia was also in breach of a fiduciary duty owed to Mrs. Hayward. Thus, the general observations made previously with respect to *Woods* and the banker's obligation of confidentiality are equally applicable to *Hayward*. However, certain other aspects of Potts J.'s decision should also be noted.

First, the judge briefly considered what constitutes a fiduciary relationship and when one arises. Agreeing with Professor Sealy,[39] he decided that no set definition of "fiduciary" is possible, rather the existence of such a relationship must be ascertained on a case by case basis. The nature of the obligations would be discerned from the intention and conduct of the parties or the wording of a contract. Secondly, Potts J. gave several examples of cases said to be germane, including *Woods* and *McBean*, but interestingly also included *Lloyds Bank Ltd. v. Bundy*[40] and two Canadian cases in which *Bundy* was applied, *McKenzie v. Bank of Montreal*[41] and *Royal Bank of Canada v. Hinds*.[42]

If Carruthers J.'s invocation of *Woods* raises questions about the relationship between negligent misrepresentation and fiduciary obligation, then Potts J.'s reliance on *Bundy* raises similar questions about unequal bargaining power and fiduciary obligation in the banker and customer relationship. Superficially, of course, *Bundy* and the *Bundy* line of cases in Canada[43] can be distinguished from *Woods*, *McBean* and *Hayward*. The former are not about investment advice-giving, but rather about situations in which a bank takes a security from the plaintiff for a loan made or about to be made to a third party in order to cover the third party's indebtedness to the bank. Until *Hayward* the two groups of cases had been separate. It may be that Potts J. drew on *Bundy* because at a deeper level the two fact situations converge. Whether a bank gives investment advice about a company indebted to them or

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[39] *Supra* note 3, at 303, 7 D.L.R. (4th) at 139.

[40] [1974] 3 All E.R. 757 (C.A.).

[41] 12 O.R. (2d) 719, 70 D.L.R. (3d) 113 (C.A. 1976).

[42] 20 O.R. (2d) 613, 88 D.L.R. (3d) 428 (H.C. 1978).

[43] In addition to *Mackenzie*, *supra* note 41 and *Hinds*, *supra* note 42, they include: Bomek v. Bomek, 20 Man. R. (2d) 150, 146 D.L.R. (3d) 139 (C.A. 1983); Buchanan v. Canadian Imperial Bank of Commerce, 23 B.C.L.R. 324, 125 D.L.R. (3d) 394 (C.A. 1980); Bank of Nova Scotia v. MacLellan, 30 N.B.R. (2d) 596 (Hughes C.J.), 31 N.B.R. (2d) 141 (Ryan J.A., Richard J.A.), 75 A.P.R. 141 (C.A. 1980); *Standard*, *supra* note 4; Bank of Montreal v. Hancock, 39 O.R. (2d) 82, 137 D.L.R. (3d) 648 (H.C. 1982); Royal Bank of Canada v. Poisson, 26 O.R. (2d) 717, 130 D.L.R. (3d) 735 (H.C. 1977); National Westminster Bank v. Morgan, [1983] 3 All E.R. 85 (C.A.).

takes a security on one party's property to facilitate a loan to an already indebted third party, their conduct gives rise to a conflict of interest.

Although it is somewhat difficult to discern whether the Court in *McBean* found that the fiduciary relationship existed because of Mrs. McBean's detrimental reliance on Dunnell's advice, it is clear in *Hayward* that it was the unequal bargaining positions of the parties that created the fiduciary relationship. The Court in *Hayward* further decided that having found a breach of the fiduciary duty, there was no need to consider the plaintiff's alternate argument in negligent misrepresentation. Thus, it appears that despite almost identical facts and the purported application of *McBean*, the Court adopted a doctrinal foundation in *Hayward* which differed from the one used in *McBean*. Instead of a doctrine of fiduciary duty resembling negligent misrepresentation, the fiduciary duty in *Hayward* appears to resemble the doctrine of unequal bargaining power or possibly undue influence. When a potentially significant change is underway in the banker-customer relationship such divergence clearly calls for further analysis.

B. *Standard Investments*

In contrast to the exotic cow cases, *Standard* considered the exercise of an alleged fiduciary duty to warn one customer about investing in another customer's enterprise. The facts were complicated. The plaintiffs were two highly successful Maritime businessmen with excellent reputations for honesty and integrity, an investment company, Standard, in which they owned equal shares and another investment company owned by one of the businessmen. The plaintiffs wished to acquire control of a trust company whose head office was in Toronto. The defendant Bank was the banker for both the plaintiffs and the trust company. To acquire control of the company in question, the plaintiffs decided that they would need the Bank's goodwill, its financial support and the support of one of the Bank's directors. This individual had also been a director of the trust company until the enactment of a statutory prohibition on interlocking directorships in banks and trust companies; nevertheless, he remained a dominant force in the affairs of the trust company as chairman of an advisory board to the trust company. It is clear that the plaintiffs were regarded as excellent customers by the Bank and that the manager of their local Moncton branch was a close school friend of one of the businessmen.

In 1972 the plaintiffs had confidentially discussed with the Bank's president their aspiration to gain control of the trust company and their need to borrow twelve to fifteen million dollars to finance the acquisition. At that time the chairman of the Bank's board, at the instigation of the influential director, had directed the Bank to purchase the maximum legal limit of ten percent of the company's shares in order to impede the plaintiffs' efforts to get control. However, the president had been unaware of this decision and had encouraged his clients' proposed purchase. At trial, the then chief general manager of the Bank testified that in forty years of banking experience he had never known of a situation in which the Bank had purchased shares at the instigation of a director to prevent the takeover of a company in which the director had a personal interest. Moreover, there appeared to have been a communication breakdown between the president and the chairman of the Bank. The president gave evidence that had he known of the Bank's policy on the matter, he would not have encouraged the plaintiffs to proceed but would have discouraged them as far as he could without breaching the confidentiality owed to the trust company and the influential director.

In 1974 the president became the chairman of the Bank and learned the full facts. The trial judge found, despite evidence given to the contrary, that the president had tried to dissuade the plaintiffs from pursuing the course they had adopted. In any case, he had emphasized that if they wished to continue successfully they would require the support of the influential director. By the beginning of 1979 the plaintiffs had purchased about thirty-two percent of the trust company's shares and about one-half of this acquisition had been financed by the Bank.

Throughout the 1970's the plaintiffs had also met regularly with the influential director in an attempt to procure his assistance in the purchase of a twenty-five percent block of shares held by an estate. In 1978, however, after the death of this director, his successor on the C.I.B.C. board purchased the block. This purchase was allegedly made at the request of two other shareholders, one of whom was the first director's widow and the other the widow of his former business partner. The Bank provided a line of credit to finance this acquisition as well as the acquisition of other shares in the trust company. As a result, by the beginning of 1979 the second director controlled about forty-four percent of the shares. In July 1979, after a frustrating series of negotiations between the plaintiffs and the second director, the latter sold his and the Bank's shares to a Winnipeg-based company at $44 per share. In August 1982 the plaintiffs sold their block to another purchaser at $34.50 per share.

The plaintiffs argued that from 1972 to 1979 a fiduciary relationship had existed between themselves and the Bank which imposed on the bank a duty of utmost good faith. This duty had been breached in two ways. First, in 1972 the Bank had continued to encourage the plaintiffs to gain control of the trust company when it knew that they were unlikely to succeed and ought to have told the plaintiffs so quite plainly. Secondly, in 1978 and 1979 the Bank's holding of the pivotal ten percent block of shares created a conflict of interest for the Bank between the plaintiffs on the one hand and the second director, also a customer, on the other. To deal fairly with both parties the Bank could have chosen one of several courses of action: retain the ten percent and not make it available to either party, sell the ten percent through the Stock Exchange, sell five percent to each party, hold an auction or advise both parties that it would not sell its holding until after 15 September 1978 when certain provisions of the *Securities Act*[44] came into effect requiring that in a takeover, the shares of all shareholders be purchased at an equivalent price. The Bank argued that no fiduciary duty was owed and that the relationship between the plaintiffs and the Moncton Main Street branch was simply one of debtor and creditor.

Griffiths J. dismissed the action against the C.I.B.C. but not without expressing his personal views about the Bank's conduct. In his closing remarks he stated:

> I have had considerable sympathy for the plaintiffs in this matter, although I have been unable to find any legal basis upon which they would be entitled to recover.
>
> With regard to the policy of the Bank in this case to secretly purchase shares in an effort to thwart the efforts of one of its customers in favour of another, although not illegal, I find that policy morally offensive.[45]

Certain features of the judge's decision appear more interesting in light of this personal statement. Griffiths J. decided that the Bank was not in breach of a common law duty of care towards the plaintiffs. He considered the determination of whether or not there had been a breach of fiduciary duty to be the crucial issue of the case. Presumably what the Court meant was that the Bank had not breached any of the terms implied by law into the contract between the banker and customer; neither had it breached the duty of care associated with the tort of negligent misrepresentation, the misrepresentation in this case being by silence or by statements of half-truths.

In order to decide whether the Bank was in breach of a fiduciary duty owed to the plaintiffs, the Court first had to determine whether a fiduciary relationship existed and whether a duty thereby imposed had been breached. Agreeing with previous writers on the subject,[46] Griffiths J. stated that in determining whether a fiduciary relationship had been created the courts have preferred a concept of fiduciary that is not limited to certain fixed classes of legal relationships.[47] Although the relationship between banker and customer had generally been one of debtor and creditor, in special circumstances a fiduciary relationship could be created, as shown in *Bundy*. If a customer placed trust and confidence in a banker who had undertaken to act for or on behalf of that customer, then a fiduciary relationship was established.[48] At one point in his analysis Griffiths J. referred to a "special confidence".[49] However, it is not evident either from his judgment or from the general

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[44] R.S.O. 1980, c. 466.
[45] *Supra* note 4, at 43, 5 D.L.R. (4th) at 488.
[46] J. SHEPHERD, *supra* note 11, at 4.
[47] *Supra* note 4, at 35, 5 D.L.R. (4th) at 481.
[48] *Id.* at 35-38, 5 D.L.R. (4th) at 481-83.
[49] *Id.* at 36, 5 D.L.R. (4th) at 481.

law of fiduciaries that there is any difference between "special confidence" and "confidence".

Griffiths J. also noted that with the establishment of a fiduciary relationship, equity imposes certain duties on the fiduciary. In particular, a fiduciary is required "to act in good faith and with due regard to the interests of the one imposing the confidence".[50] Furthermore, a fiduciary must refrain from letting any personal interest sway him from the proper performance of his undertaking and from misusing the position of trust his undertaking gives him to further his own interests. "He must not profit from his position of trust."[51]

It is quite clear from Griffiths J.'s discussion of the applicable principles that the linchpin of his notion of the fiduciary relationship is mutual undertaking and reliance. He sums up his discussion by stating:

> It is the undertaking to act for and on behalf of another which imports the fiduciary responsibility. The conflict of duty and interest rule applies not simply because of the placing of trust and confidence but, in my view, because of the undertaking of the fiduciary to act for or on behalf of his principal.[52]

Armed with this working definition of fiduciary obligation, the judge asked whether a fiduciary relationship had ever been established between the C.I.B.C. and the plaintiffs. He found that a fiduciary relationship had been created in 1972. The plaintiffs had placed their trust and confidence in the Bank and the Bank had undertaken to advise them on the soundness of their plans and to effect an introduction to the influential director. However, Griffiths J. did not accept the plaintiffs' submissions that the fiduciary duty had been breached. He found that while the Bank's conduct may have been unusual or even unprecedented, it did not amount to a conflict of interest. In addition, the Bank would have breached its duty of confidentiality owed to its other customers had it disclosed the fact that it was purchasing the shares. In any case, such disclosure would not necessarily have discouraged the plaintiffs. The Bank had fulfilled its "primary obligation"[53] by effecting an introduction to the influential director. It could reasonably have been anticipated that the director would convey to the plaintiffs his opposition to their plans.

Finally, Griffiths J. turned to the second period in 1979 during which the plaintiffs also alleged a breach of the Bank's fiduciary obligation . The judge, however, was unable to find that a fiduciary relationship had been established either in 1979 or at any time between 1972 and 1979. During that period the Bank had not received confidential information with which it could have taken any unfair advantage. Even

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[50] *Id.* at 38, 5 D.L.R. (4th) at 483.
[51] *Id.* at 35, 5 D.L.R. (4th) at 481.
[52] *Id.* at 38, 5 D.L.R. (4th) at 483.
[53] *Id.* at 40, 5 D.L.R. (4th) at 485.

assuming that it had, the Bank had not undertaken to act for or on behalf of the plaintiffs but only to lend them money for general investment purposes.

A literal application of Griffiths J.'s theory of fiduciary relationships could easily have led to quite different factual analyses and legal conclusions than those arrived at by the Court. The Court could have found that the Bank was in breach of its fiduciary duty to the plaintiffs in 1972 and that there was also a continuing obligation until 1979 that had also been breached.

It could be argued that the Bank's position in 1972 was not only one of conflict of interest *per se* but also one in which the Bank chose to aggravate that conflict by assisting one interest more than another. Undoubtedly the Bank acted in its own future interest, that is, to retain the customers controlled by the influential director. The Bank's purchase of what could foreseeably have become the pivotal shareholding, at the instigation of this director, clearly constituted favouring one customer at the expense of the other. The Bank ought not to have made the purchase; moreover, it should have told the plaintiffs unequivocally that their chances of a successful takeover were almost non-existent. Arguably, such a statement would not have breached the duty of confidentiality owed to other customers. The reported evidence indicated that the plaintiffs had realized from the start that without the support of the Bank and the influential director their plans would fail. The plaintiffs had made this clear to the Bank. Yet, in the early stages the Bank encouraged and assisted them and in the later stages did not warn them of their probable failure. Indeed, the plaintiffs gave evidence that had the Bank more actively discouraged them they would not have persisted in their efforts. It is clear from the evidence that although the Bank president's initial enthusiasm was tempered once he was made aware of what was actually transpiring in Toronto, nevertheless, the Bank's senior officers and the influential director continued to meet with the plaintiffs on business and social occasions during which the proposed purchase was discussed. In light of these circumstances it appears inexcusable for the trial judge to have found that even if the Bank did not make its position clear to the plaintiffs, it was entitled to rely on the influential director to do so and thus avoid liability.[54] It should also be noted that the indoor management rule precluded the Bank's reliance on the breakdown in communication between the president and the chairman as a defence. Thus, it is questionable whether the Bank had not breached the fiduciary duty owed to the plaintiffs in 1972.

The trial judge also found that in 1979 no fiduciary relationship had been established. Apparently, he thought that the determinative issue

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[54] *Id.*

was whether a new fiduciary relationship had come into existence in 1979. However, it could be argued that the fiduciary relationship created in 1972 continued throughout the decade[55] as the senior officers of the Bank and the influential director continued to meet with the plaintiffs. Indeed, when the second director decided in 1978 to sell his forty-four percent holding as well as the Bank's ten percent share that he claimed to control, the plaintiffs were given the opportunity to make an offer. Thus, it could be argued that the plaintiffs had been misled by the Bank for most of the period from 1972 to 1979.

Even if there was no continuing fiduciary obligation, Griffiths J.'s view that there was no new or renewed fiduciary obligation created in 1979 could also be disputed. In this regard, it is important to note that the judge adopted a somewhat different concept of fiduciary obligation from the one he had originally considered. He appears to require the acquisition by the Bank of new confidential information in 1979 as the key criterion for the establishment of a fiduciary relationship. Confidential information had not been included in his earlier statements of legal principle, nor in his finding of a fiduciary relationship in 1972. If the confidential information requirement were ignored, it could be argued that the Bank owed a new or renewed obligation to the plaintiffs with respect to the second director's purchase and sale of the trust company shares: the plaintiffs had continued to be customers of the Bank and, to the Bank's knowledge, were still keenly interested in purchasing control of the company. Thus, the facts as found by the trial judge admit of more than one interpretation when viewed in light of his original definition of fiduciary obligation.

Some more general observations can be made about the decision in *Standard*. First, the Court clearly considers the case to be about fiduciary relationships. There is no reference to *Hedley Byrne* or *Woods* and *Bundy* is invoked (however rightly or wrongly) only to show that the banker-customer relationship is one of the established categories of fiduciary obligation and not that unequal bargaining power is the essence of such a relationship. Secondly, the tendency in the two exotic cow cases to commingle fiduciary obligation with, *inter alia*, negligent misrepresentation and unequal bargaining power, is not evident in *Standard*; rather, thirdly, Griffiths J. attempts to provide a discrete concept of fiduciary obligation. Fourthly, the content of the fiduciary obligation espoused by the Court is essentially reliance-based: a customer relies on advice which the bank has knowingly undertaken to provide. Fifthly, it is not self-evident that such a doctrine resolves satisfactorily the factual

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[55] *Compare*, *supra* note 3, at 307, 7 D.L.R. (4th) at 143 (Potts J.):

Once the fiduciary relationship is established, each meeting is merely a continuation of that relationship, complete with ensuing obligations. At no time did Dunnell attempt to rectify the problem he created by establishing the relationship. The breach of fiduciary duty continues throughout.

difficulties that are created when banks undertake to give or fail to give investment advice. When giving advice, reliance without more will almost always produce a legal duty, as shown above. Moreover, when undertaking to give advice, banks will generally have a conflict with their own interests or the interests of another customer. With this conflict comes the danger of breaching the implied duty of confi dentiality. Again, Griffiths J.'s introduction of an additional requirement, confidential information, suggests that the notion of fiduciary obligation originally formulated may not be adequate for the determination of both the factual and legal questions.

Preliminary analysis of *McBean*, *Hayward* and *Standard* suggests that there are substantial issues to be addressed before a decision can be reached as to the appropriateness of the importation of a fiduciary obligation into the banker-customer relationship and as to the nature of that obligation. The first issue to untangle is the confusion that appears to exist as a result of the use of *Woods* on the one hand and *Bundy* on the other.

III. FIDUCIARY RELATIONSHIPS AND NEGLIGENT MISREPRESENTATION

As noted earlier, the Ontario High Court's re-discovery of *Woods* in 1981 was somewhat surprising, if only for reasons extrinsic to the decision. However, examination of the case itself reveals intrinsic reasons for its hitherto relegation to legal oblivion. The facts of *Woods* were quite similar to those of the exotic cow cases: a banker had recommended investment in a company he knew to be in financial difficulty. Mr. Woods, "a pleasant and honest young man but rather stupid and extremely gullible",[56] inherited a sum of money that he invested in the new company on the advice of Johnson, the manager of the local branch of Martins Bank. The company, Brock Refrigeration Ltd., was a customer of the Bank and clearly in considerable financial difficulty. In fact, the Bank's district head office had been pressing Johnson to secure the reduction of the company's substantial overdraft. The trial judge found, however, that when the local manager had advised Woods to invest in the company, he had honestly believed "in his muddled-headed way"[57] that the investment was a wise and prudent one; indeed, one which he would have made himself if he had had the necessary capital. But for Johnson's advice, Woods would not have made the investments, if only because he lacked the initiative to do so. Although Woods had not been a customer of Martins Bank when the advice was given and the first £5,000 invested,

[56] *Supra* note 24, at 58. Salmon J. added that "[h]e was, in fact, the very prototype of the lamb waiting to be shorn. And he did not have long to wait." *Id.* at 59.

[57] *Id.* at 60.

he became a customer by opening an account three weeks later. Woods lost about £15,790. Even if the company had succeeded Woods would not have profited because his investment had not been in common shares which yielded dividends. Woods had also guaranteed an associated company's overdraft, again on Johnson's advice. Woods framed his action in fraud and negligence. His action in fraud failed because the Court found that Johnson's belief was honest.

The Bank defended the action in negligence on a number of grounds, all of which failed. First, it relied on *Banbury v. Bank of Montreal*[58] to escape liability by arguing that investment advice is outside the scope of the banking business. The Court held, however, that *Banbury* turned on its peculiar facts; in particular, that the manager in that case had not had authority to give investment advice. The judge held that although the scope of banking could not be laid down as a matter of law but only as a matter of fact, the Bank's extensive advertisements proclaiming its expertise in investment advice brought Johnson's conduct within the scope of banking business. Secondly, the Bank argued that it owed no duty to Woods because he was not a customer at the time the advice was first given. Salmon J. found that regardless of when or even if Woods had become a customer, the Bank owed him a legal duty in relation to the advice which caused the loss. It had been clear to both parties that Johnson was being consulted and was giving advice in his capacity as a branch manager; moreover, Woods had been a potential customer whose business the Bank had been anxious to acquire. Thirdly, the Bank argued that Woods would have made the investments without Johnson's advice. The trial judge found otherwise on the facts. Finally, Martins Bank attempted unsuccessfully to resist liability for the legal duty of care associated with the fiduciary relationship that Salmon J. found to exist.[59] That duty of care required the Bank to advise the plaintiff with reasonable skill and care.[60] There would be no negligence merely because the advice proved to be wrong or because the banker failed to exercise some extraordinary skill or care.[61] In the Court's view, the Bank should never have advised Woods but having decided to do so, it ought to have disclosed the conflicting interests between Woods and the Bank and between Woods and the Bank's corporate customers.[62]

A number of observations may be made about Salmon J.'s brief and simple statement of principle. First, no precedents are cited, not even *Nocton v. Lord Ashburton* which dealt with fiduciary obligations

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[58] *Supra* note 14.
[59] *Supra* note 24, at 72.
[60] *Id.* at 71.
[61] *Id.* at 73.
[62] *Id.*

in advice-giving situations. Salmon J. was working in a legal vacuum.[63] Secondly, it is not clear how the fiduciary relationship was created or what substantive content it had. No consideration was given in the judgment to the banker-customer relationship *per se* and, in particular, to any unique qualities that would establish a fiduciary obligation in advice-giving situations. It was not made clear how advice-giving by bankers differs, if at all, from advice-giving by professionals, businessmen or other persons with superior skill or knowledge. Thirdly, from a contemporary perspective, it would appear that Salmon J. thought that two quite distinct types of legal duty resulted from a fiduciary relationship: a legal duty of care, which after *Hedley Byrne* would be categorized as negligent misrepresentation and a duty of loyalty which is often said to be the "hallmark" of a fiduciary relationship.[64] Such a duty of loyalty is not expressed in the judgment but is implicit in the comments on conflict of interest. It is not clear that the judge perceived the distinction between the two duties, which is not surprising given the date of the decision. However, it can be surmised from the contextual circumstances that undertaking and reliance were essential to both. Thus, in several places, Salmon J. clearly states that although the Bank was not obliged to give advice, once it decided to do so, knowing that its advice would be relied on, it owed a legal duty to take reasonable care and to disclose any conflicts of interest.

The "freakish" re-discovery of *Woods* seems equally odd in terms of the intrinsic worth of Salmon J.'s judgment. Yet, the mutation of *Woods* by the Law Lords in *Hedley Byrne* into a case about negligent misrepresentation unfairly ignores the overlap between that tort and fiduciary obligation, which Salmon J. may have faintly perceived — the common element of reliance. If the two principles do overlap in certain respects, why have subsequent courts in *McBean*, *Hayward* and *Standard* favoured fiduciary obligation, however defined, over negligent misrepresentation? After *Hedley Byrne* negligent misrepresentation could reasonably have been thought to be the obvious approach to advice-giving cases. However one wishes to define fiduciary obligation, it is clearly a more difficult principle or set of principles to apply than negligent misrepresentation. Today negligent misrepresentation is invoked when reasonable reliance on advice causes loss, regardless of the existence of "negligence" as traditionally defined. Indeed, the peculiarity of the Canadian adoption of fiduciary obligation is underlined by the English adoption of negligent misrepresentation.

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[63] Counsel for the plaintiff cited Batts Combe Quarry v. Barclays Bank Ltd., 48 T.L.R. 4 (K.B. 1931). In that case, Avory J. held that a bank owed a duty not to be negligent when giving advice to a third party with respect to the financial stability of a customer.

[64] *See generally*, J. SHEPHERD, *supra* note 11; D. WATERS, THE LAW OF TRUSTS IN CANADA (2d ed. 1984).

One remaining question raised by *Woods* that must be addressed if a workable fiduciary notion is to be imported into the banker-customer relationship is the possible relationship between negligent misrepresentation and fiduciary obligation. Reliance is a feature common to both negligent misrepresentation and fiduciary obligation. The failure to perceive this similarity may explain the judicial inability to distinguish between these concepts.[65] This failure is understandable in *Woods* but is *unforgiveable* after *Hedley Byrne*. Certainly, the distinction is made more difficult by the fact that reliance is not typically found in tort law. At first glance its presence makes negligent misrepresentation look more like an equitable doctrine, a type of fiduciary obligation, than a tortious one.[66] Yet in *Hedley Byrne* the House of Lords clearly categorized negligent misrepresentation as an action in tort and sought to establish it as a third type of reliance liability.[67] Whatever the original merits of the Law Lords' decision to classify negligent misrepresentation in tort rather than equity, the issue is now moot given the explosion of reliance-based liability and the proliferation of "*Hedley Byrne*" cases in the past two decades. Negligent misrepresentation is on a frolic of its own and unlikely to return to the equitable fold in the foreseeable future.

Delineation of this essential common feature explains the commingling of negligent misrepresentation and fiduciary obligation in *Woods*, *McBean* and *Hayward* but it is their differences that determine which doctrine may be more appropriate in the context of banks and advice-giving. *Hedley Byrne*, as currently applied, involves little more than reasonable reliance on bad advice that is given honestly but results in loss. Neither a special relationship between the parties nor "negligence", as traditionally defined, is required. Negligent misrepresentation can still be distinguished from fraudulent misrepresentation by the absence of subjective deceit but it has apparently devoured its own progenitor, innocent misrepresentation, which appears to have gone the way of the dinosaurs. In contrast, as a creature of equity and a collateral cousin of trusts, fiduciary obligation, as currently understood, necessarily involves not just the element of reliance but also loyalty. When courts say that fiduciaries should avoid conflicts of interest or should make full disclosure, they are, in the final analysis, saying that the fiduciary owes an *absolute* duty of loyalty to the interests of the person on whose behalf he undertakes to act. Loyalty, then, is a superadded duty, over and above the tortious duty of reasonable skill

[65] The following discussion relies heavily on J. SHEPHERD, *supra* note 11, at 245-53, although my conclusions differ substantially.

[66] This argument was made by Professor Sealy, writing just prior to *Hedley-Byrne*. Sealy, *Some Principles of Fiduciary Obligation*, *supra* note 11, at 137.

[67] This third type of reliance liability would be in addition to contractual reliance and the existing categories of fiduciary reliance.

and care. Breach of loyalty invariably occurs when the defendant has divided loyalties and favours one party over another. Typically, the fiduciary has a personal interest in the transaction or acts for both sides. In the banking cases both possibilities are present. Thus, to be successful, an action for breach of a fiduciary duty requires proof of breach of loyalty.

Analytically, an action for breach of fiduciary duty in relation to advice-giving now has two requirements; namely, that the advice given proves to be erroneous and that there is a fiduciary relationship between the advice-giver and the recipient. These requirements indicate that two quite different factors are involved in such an action, conduct and relationship. It could be argued that when the recipient relies on the advice and suffers a loss, only conduct is relevant. The relationship between the parties, even if fiduciary in nature, has no additional legal significance. All that is required is to show that the advice was bad and that loss resulted. It can also be argued that relationship is relevant only where no loss is suffered but where the recipient has some other reason to complain, for example, when the advice-giver appears to have been unjustly enriched. This latter case is clearly atypical and produces complex analytical problems, as shown in *Boardman v. Phipps*.[68]

If reliance-based loss is the essential feature of cases involving advice-giving, it is arguable that the importation of a fiduciary duty of loyalty is entirely superfluous. The requirement of a fiduciary obligation may prove fatal to the plaintiff's case, as shown in *Standard*. As previously discussed, the Court in that case found that no fiduciary obligation arose in 1979 despite facts that clearly indicated the plaintiff's continued reliance on the Bank. Arguably, the trial judge's importation of confidentiality into his earlier definition of fiduciary obligation was an attempt to add a duty of loyalty into the relationship. Had reliance and undertaking been the test, legal liability for the plaintiff's loss would have followed. Conversely, in *McBean*, the judge confused negligent misrepresentation and fiduciary obligation (of the *Woods* type) and found reliance to be the key factor. The Court had no difficulty in finding the Bank liable for Mrs. McBean's loss. A somewhat similar situation existed in *Hayward* although, as will be explored below, reliance and undertaking hinged on unequal bargaining power.

A second way in which negligent misrepresentation and fiduciary obligation appear to differ is in regard to their respective tests for breach of duty. Negligent misrepresentation is concerned with competence, whereas fiduciary obligation requires honesty and good faith. The former is essentially objective in nature, while the latter is subjective. At first glance this distinction seems significant as liability for breach of a fiduciary duty can easily be established once an *absolute* duty of loyalty

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[68] [1966] 3 All E.R. 721 (H.L.).

is imposed. This duty is breached if the fiduciary acts in any manner that either harms the recipient of his advice or enhances the fiduciary's own interests. Today, the presence of a fiduciary duty raises a rebuttable presumption of misuse of confidence. The nature of the liability is somewhat similar to strict liability. However, in negligent misrepresentation, whenever there is detrimental reliance on advice given in an advice-giving relationship, courts will find a breach of the duty to take reasonable care. Thus, it is arguable that the tests for breach in both negligent misrepresentation and fiduciary obligation do not differ significantly; both require evidence of advice-giving which causes loss. Again, no additional legal advantage accompanies the fiduciary obligation approach.

A third way in which negligent misrepresentation and fiduciary obligation appear to differ is with respect to remedies. Breach of a duty of care in tort results in damages for loss sustained, whereas breach of a fiduciary duty additionally provides the restitutionary remedies, which may include the right to profits made by the defendant.[69] This is clearly a formidable distinction which closer examination cannot explain.[70] However, it is possible to argue that the difficulty can be circumvented by invocation of the fifteenth century dictum, *ubi jus, ibi remedium.* As a finding of fiduciary obligation is difficult to establish (because a duty of loyalty, in addition to reliance and undertaking, is required), it is unjust to "force" plaintiffs to use the fiduciary obligation approach to avoid the remedial shortcomings of negligent misrepresentation. Instead, re-thinking and perhaps integration of the legal and equitable remedies should be pursued, in practice as well as in theory.

In conclusion, it is submitted that the application of *Woods* in the exotic cow cases creates considerable difficulty with respect to determining precisely which legal principles were being applied and why. *Woods* appears to raise more questions than it answers and may well be irrelevant to advice-giving by banks after *Hedley Byrne.* It may be that the importation of a fiduciary obligation into the banker- customer relationship creates difficulties which could be avoided by adopting other legal approaches.

IV. FIDUCIARY RELATIONSHIPS AND UNFAIR CONTRACTS

In addition to relying on *Woods* and *McBean*, Potts J. in *Hayward* also drew on *Lloyds Bank v. Bundy* to find that the fiduciary duty between the banker and his customer had been breached. The adoption of *Bundy*

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[69] The remedial advantages for an action for breach of fiduciary duty are argued by Talbott, *supra* note 11 and JONES, *supra* note 11.

[70] It is clearly beyond the scope of this paper to attempt to do so.

and two of the Canadian cases in which it has been applied suggests that it is not only the overlap between negligent misrepresentation and fiduciary obligation which requires further clarification by the Canadian courts. The overlap between fiduciary obligation and the various principles invoked in *Bundy* and the Canadian cases to resolve disputes about unfair contracts also needs clarification. Potts J. found that the fiduciary obligation owed by the Bank to Mrs. Hayward arose from their respective unequal bargaining positions. This holding raises the question of whether inequality of bargaining power is of the essence of fiduciary obligation. Moreover, in the Canadian *Bundy* cases unconscionability is also considered,[71] thereby further complicating the relationship between fiduciary obligation and unfair contracts.

Bundy and the Canadian *Bundy* cases were not concerned with situations in which bankers were primarily giving investment advice but rather situations in which they were taking additional security from customers for loans made or about to be made to third parties. In these cases, the banks' self-interest was obvious. The additional security was taken because it was foreseeable to everyone but the guarantor, at the time the loans were made, that the investment would fail. Self-protection was the bankers' paramount motive. Although the *Bundy* cases are distinguishable from the Ontario High Court decisions on their facts, the confusion surrounding fiduciary obligation and the doctrines invoked to control unfair contracts stems from their similarities and therefore is worthy of further investigation.

The facts of *Bundy* are too well known to bear repeating. However, for the purposes of the present discussion certain aspects of the case should be highlighted. It will be recalled that the majority decision rendered by Sir Eric Sachs (Cairns L.J. concurring) held that the guarantee could be avoided on the ground of undue influence. Lord Denning M.R., on the other hand, rested his decision on the principles relating to inequality of bargaining power or in the alternative, on undue influence. Cotton L.J., in *Allcard v. Skinner*,[72] had identified two categories of undue influence: the first category consisted of cases in which the stronger party has been guilty of some fraud or wrongful acts in relation to the weaker and the second category consisted of cases in which there has been no wrongful act, rather a relationship of confidence existed in which a presumption of influence arose.[73] The Court in *Bundy* found that as there was clearly no wrongdoing on the part of the Bank, the undue influence was of the second type. It was necessary, therefore, to determine whether a fiduciary relationship had been established.

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[71] *See, e.g., supra* note 43.
[72] 36 Ch. D. 145 (1887).
[73] *Id.* at 171.

The judge stated that the existence of a fiduciary relationship depends on the facts; moreover, it is impossible to define specifically the relationship or its characteristics. However, previous cases had suggested that such a relationship arose when one party relied on the advice of another and the advice-giver, aware of the reliance, profited in some way from the subsequent transaction. In addition, an element of confidentiality was required to make the reliance relationship a fiduciary one. Sir Eric held that no set definition of confidentiality was possible but that it conveyed "that extra quality in the relevant confidence that is implicit in the phrase 'confidential relationship' ... and may perhaps have something in common with 'confiding' and also 'confidant' ".[74] Once confidentiality existed, influence naturally grew from it. A confidential relationship imposed a duty on the fiduciary to insist that the reliant party obtain independent advice or, at the very least, be sufficiently informed of factors which might influence his judgment. It was not necessary for the fiduciary to abuse his position to invalidate a transaction: the existence of the "special relationship"[75] was sufficient.

In contrast, the minority decision of Lord Denning M.R. gathered undue influence into the fold of unequal bargaining power, in a judgment which is often subsequently cited as if it were the *ratio* of *Bundy*. Together with duress of goods, unconscionability, undue pressure and salvage agreements, undue influence was said to rest on an unequal bargaining power which arose when the weaker party entered into a transaction that was grossly unfair because of pressures brought to bear by the stronger party. Whether such unequal bargaining power existed is a question of fact.

As stated earlier, in *Hayward* Potts J. opined that the fiduciary obligation resulted from the unequal bargaining positions of the Bank and Mrs. Hayward, thereby apparently merging the majority and minority opinions in *Bundy*. Other fiduciary cases in which *Bundy* was applied further confuse the issue by bringing unconscionability into consideration. In these cases the defendants were emotionally attached to the third parties on whose behalf they had provided the security to the plaintiff banks. In *McKenzie*[76] the defendant was the companion of an unscrupulous man. In *Hinds*[77] the defendant was a widow who had been requested to give a promissory note to secure her late husband's indebtedness within days of her husband's death. In *Buchanan v. Canadian Imperial Bank of Commerce*[78] the defendants had granted a mortgage on their house, their only asset, to assist their son-in-law's failing business.

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[74] *Supra* note 40, at 767.
[75] *Id.* at 768.
[76] *Supra* note 41.
[77] *Supra* note 42.
[78] *Supra* note 43.

In *Bomek v. Bomek*[79] the defendants had granted a mortgage on their house, albeit unknowingly, to assist their son's failing business. Similarly, in *Bank of Montreal v. Hancock*[80] the defendant wife, while under medical treatment for a nervous breakdown and in the throes of a divorce action, signed a promissory note to secure a large overdraft on her joint account with her husband.

In all of these cases the defendants had not been fully aware of the financial difficulties of the enterprises they were securing and the banks had failed to so inform them or to advise them to seek independent advice. The banks had taken the securities for their own benefit. Furthermore, all of these cases cited *Bundy*, held that a fiduciary relationship existed and struck down the transaction as unconscionable. In each of these cases the mix of legal principles was slightly different. *Bundy* was strictly applied in both *McKenzie* and *Hinds*: the defendant's bargaining position was so weak that a fiduciary duty was imposed on the Banks to ensure that the defendants had independent advice prior to execution of the security documents. Despite the references to unconscionable transactions in the headnotes to the two cases, the Courts did not discuss unconscionability at all. Conversely, in *Buchanan*, *Bundy* was cited and applied but it was the presence of unequal bargaining power that led to the conclusion that the secured transactions were unconscionable. No fiduciary relationship was found or even discussed. It would appear from both the trial and appeal decisions that the Courts had viewed *Bundy* through the spectacles of *Morrison v. Coast Finance Ltd.*,[81] an earlier case about unconscionable transactions. In *Bomek* the Court again found that there was considerable disparity in bargaining positions and held that the transactions were unconscionable without imposing a fiduciary relationship. Finally, in *Bank of Montreal v. Hancock*[82] the Court decided to have the best of both worlds by first applying *Bundy*, *McKenzie* and *Hinds* and then imposing a fiduciary relationship in the addendum to the decision.[83]

In contrast to these cases, there are three decisions in which *Bundy* has been considered but distinguished. In *Royal Bank of Canada v.*

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[79] *Id.*

[80] *Id. See also* Ogilvie, *Joint Bank Accounts and Overdraft Liability*, 23 U.W.O.L. REV. (1985).

[81] 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A. 1965). *See also* Crawford, *Restitution — Unconscionable Transaction — Undue Advantage of Inequality between Parties*, 44 CAN. B. REV. 142 (1966); Mundinger v. Mundinger, [1969] 1 O.R. 606, 3 D.L.R. (3d) 388 (C.A.), *aff'd* 14 D.L.R. (3d) 256n (S.C.C. 1970); Knupp v. Bell, 67 D.L.R. (2d) 256 (Sask. C.A. 1968); Tweedie v. Geib, 19 Sask. R. 48, 138 D.L.R. (3d) 311 (Q.B. 1982).

[82] *Supra* note 43.

[83] *Id.* at 89, Addendum not included in 137 D.L.R. (3d) 648. This was added in response to the New Brunswick Court of Appeal decision in Bank of Nova Scotia v. MacLellan, *supra* note 43.

Poisson[84] the Ontario High Court refused to overturn a guarantee signed by a wife to secure her husband's debt because the wife knew she was signing a guarantee even if she did not know the precise nature of the guarantee she had signed. In *Bank of Nova Scotia v. MacLellan*[85] the New Brunswick Court of Appeal reversed the decision of the trial judge and found that, on the facts, the wife had not relied on the Bank's advice when she had signed the promissory note to secure her husband's indebtedness. Thus, no fiduciary obligation arose which imposed on the Bank a duty to ensure that she was fully informed or independently advised. Finally, it will be recalled that in *Standard* the Court found no fiduciary obligation with respect to the 1979 events.

This brief survey of the Canadian cases in which the courts have considered a bank's fiduciary obligations in taking security suggests that there are other overlap problems to be explored in addition to those between fiduciary obligation and negligent misrepresentation. In particular, the relationship between fiduciary obligation and undue influence, unequal bargaining power and unconscionability should be examined.

A. *Fiduciary Relationships and Undue Influence*

Confidence is of the essence of undue influence. Thus, Lord Chelmsford L.C. in *Tate v. Williamson*[86] stated the general principle that underlies both categories of undue influence referred to by Sir Eric Sachs in *Bundy*:

> Wherever the persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.[87]

Such confidence, which is presumed to inhere in the category of undue influence, arises in certain relationships which historically have been classified as fiduciary: parent and child, doctor and patient, minister and parishioner. Confidence is the obverse of the fiduciary's duty of loyalty. However, confidence is also inherent in the other category of undue influence in which a stronger party exploits the confidence placed in him by a weaker party.

The requirement of a fiduciary or confidential relationship in cases of undue influence creates a two-stage analytical process: a relationship

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[84] *Supra* note 43.
[85] *Id.*
[86] L.R. 2 Ch. 55 (1866).
[87] *Id.* at 61.

in which the influence is presumed to exist must be established and use of the influence in breach of the confidence must be shown. Arguably both steps are fraught with unnecessary difficulty in the advice-giving context.

First, while it is common for people in a position of influence to exercise that influence, some fiduciaries will not do so while others will be unsuccessful even if they do try. Beneficiaries may be more knowledgeable, experienced or strong-minded than their fiduciaries. If there is a decline in respect for authority, as some sociological surveys appear to suggest, even ignorant, inexperienced and weak-minded recipients of advice may also resist a fiduciary's influence. Therefore, in a significant minority of cases the existence of a fiduciary relationship does not prove its exercise. Such an assumption is not a suitable starting point for legal analysis. Secondly, while the exercise of influence *per se* can be very subtle and leave no traces, the evidence of its exercise will usually be apparent in the result of the transaction itself. In such instances there is no need to search for or measure imperceptible signs of influence on the part of the fiduciary or exploitable infirmities on the part of the beneficiary as the advantages gained by the fiduciary will provide proof of the exercise of influence.

These criticisms suggest that the traditional analytical emphasis on such intangibles as the nature of the relationship between the parties prior to the transaction(s) or the exercise of influence arising from the relationship is no longer meaningful. Instead, legal and factual analysis should focus on the transaction itself. The disposition of real and personal property in the transaction is the key to the nature of the influence exercised. The very existence of a transaction which allows the fiduciary to gain a benefit and the beneficiary to suffer a detriment raises a rebuttable presumption that the fiduciary caused or influenced the beneficiary to act as he did. The onus is on the fiduciary to prove otherwise. There is, then, no real need to require a fiduciary relationship in undue influence cases.

The defences that have been accepted in undue influence cases also demonstrate that the existence of a fiduciary or confidential relationship is not required. The fiduciary need not prove that he did not exercise the influence which his position afforded him but that the beneficiary was possessed of sufficient information and understanding to form an independent decision to enter or to affirm the impugned transaction. The thrust of the defences is factual. Thus, subsequent confirmation,[88] lapse of time once the recipient is cognizant of the facts[89]

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[88] Wright v. Vanderplank, 44 E.R. 340 (C.A. 1856).
[89] Allcard v. Skinner, *supra* note 72.

and independent advice[90] will rebut the presumption of influence. The first two defences do not necessarily presume the exercise of influence and the third severs the causal connection between possible influence and entry into the transaction. All three are factual in nature and none requires the imposition of a fiduciary relationship.

Traditionally courts have viewed the concepts of undue influence and fiduciary obligation in the advice-giving context in a similar manner. It is, therefore, easy to see why the courts in *Bundy* and *Hayward* adapted undue influence to the banker and customer context. However, it may also be that the analysis of undue influence suggested above can likewise be adapted to fiduciary obligation in the advice-giving context. Thus, there would appear to be no compelling reason for beginning the analysis of legal obligation with a finding of fiduciary relationship. Rather, the legal obligation should hinge upon the factual obligations created when one party undertakes to give advice to another party who foreseeably will rely on the advice. Of course, confidence is present in such a situation but it is the manifestation of confidence in the recipient's reliance on the advice that results in the loss, not the confidence *per se*. Reliance and undertaking and not a confidential or fiduciary obligation should be of the essence of undue influence.

B. *Fiduciary Relationships and Unequal Bargaining Power*

It is somewhat ironic that the Court in *Hayward* rested fiduciary obligation on a finding of unequal bargaining power because historically, unequal bargaining power was developed to cope with situations not traditionally classified as fiduciary in which the relative positions of the parties allowed one to gain an advantage at the expense of the other. The majority in *Bundy* found a fiduciary obligation based on undue influence whereas Lord Denning M.R. founded his decision on unequal bargaining power without a superadded fiduciary obligation. However, the differences between undue influence and unequal bargaining power may be nominal. Unequal bargaining power tends to be applied to transactions between strangers in which their relationship arises from the transaction; on the other hand, the relationship predates the transaction in undue influence cases. Unequal bargaining power tends to be used in the context of contractual bargains rather than in relation to gifts. However, both unequal bargaining power and undue influence are concerned with the exercise of influence to obtain an advantage, thus, they may not really be distinct.

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[90] McMaster v. Byrne, [1952] 1 All E.R. 1362 (P.C.); Inche Noriah v. Shaik Allie Bin Omar, [1929] A.C. 127 (P.C.); Lloyds Bank v. Bundy, *supra* note 40; Wright v. Carter, [1903] 1 Ch. 27 (C.A. 1902); Powell v. Powell, [1900] 1 Ch. 243 (1899); Gibson v. Jeyes, 31 E.R. 1044 (Ch. 1801).

Although the definition of unequal bargaining power appears self-evident,[91] it raises three questions. Are there significant disparities in bargaining power between the parties? If so, what legal duty should attach to such a relationship? Has that duty been breached? Typically, proving inequality is not difficult; the task is intuitive and in the cases to date the disparities have been marked and, therefore, obvious. It remains to be seen how the courts will deal with the less obvious cases. As for the duty to be attached, *Hayward* suggests that it be a fiduciary duty.[92] In *Hayward* it appears that the Court thought that to attach a fiduciary obligation to a situation involving unequal bargaining power required a separate finding of fiduciary relationship. Thus, the relationship between the two concepts was not as intimate as normally is expected. As duties tend to flow naturally from certain types of fact situations, they should not require separate establishment of a fiduciary relationship. The unspoken reason for Potts J.'s approach may be the serious ramifications that would be created for the stronger bargaining party if an inherent fiduciary obligation were imposed in unequal bargaining cases.

To impose a fiduciary duty on the stronger party is tantamount to penalizing him simply because he is stronger. It amounts to imposing a duty on him to look after the weaker party's interests while advancing his own. In the normal course of events, he will not have agreed to this. He is being burdened not only with a heavy legal duty of care but also with a conflict of interest. As Shepherd has argued,[93] taken to its logical conclusion such a principle undermines modern capitalism. Instead, Shepherd suggests that before this fiduciary obligation should come into existence it should be clear that the weaker party has relied on the stronger party to protect his interests and that in the circumstances it is reasonable for him to have done so.[94] The willingness of the fiduciary to accept this shift of responsibility is said to be secondary.[95]

If the hallmark of fiduciary obligation is a duty of loyalty, then imposing reliance on one party surely cannot create a fiduciary relationship. Loyalty must be volunteered expressly or implicitly demonstrated by conduct. The fiduciary relationship which Shepherd sees as arising in unequal bargaining power cases differs from that suggested by the courts in *Hayward* and *Standard*, in which both loyalty and confidential information were required. It is also questionable whether a fiduciary obligation founded on imposed reliance alone is appropriate in the types of cases under consideration. Rather, it may

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[91] Certainly Lord Denning appears to include little more than gross inequality of bargaining power. *Supra* note 40, at 765.

[92] *See* J. SHEPHERD, *supra* note 11, at 225-38.

[93] *Id.* at 228-29.

[94] *Id.* at 231.

[95] *Id.* at 231-32.

be argued that the duty should require at least reliance and voluntary undertaking by banks to give advice. Such an obligation does not require investigations about loyalty or indeed confidence but simply requires advice given voluntarily and acted upon, causing loss. It may be asked, then, why the duty imposed in unequal bargaining cases should be a fiduciary duty rather than a duty of care?

The current importation of a fiduciary duty into unequal bargaining cases raises the question of the relationship between unequal bargaining power and undue influence, as each traditionally includes a fiduciary obligation. Apart from the process-related distinctions referred to earlier, it would appear that they also differ in regard to where fiduciary obligation fits into their respective constituent parts. In undue influence cases the first issue is to determine whether a fiduciary relationship exists in which influence could be exercised. In unequal bargaining cases the first issue is to determine whether there is an inequality of bargaining power of such disparity that the stronger party should be deemed to owe a fiduciary duty to the weaker party. In both cases, once the duty is found to exist there is usually sufficient factual evidence in the transaction or in the advantages accruing to the stronger party to show breach of that duty. This presumption is always rebuttable. Thus, the distinction between the two doctrines has no relation to their substance. Instead, the difference lies in the analysis used to establish a fiduciary obligation in relationships traditionally classified as fiduciary and in those not so classified. In the end, however, they operate on the same principles and in the same way.

If that is so, then the criteria which militate against the use of undue influence in the context of banks and advice-giving are equally applicable to unequal bargaining power: fiduciary obligation creates more difficulties than are necessary.

C. *Fiduciary Relationships and Unconscionability*

It will be recalled that none of the three cases in which the courts have considered the fiduciary obligations of banks in advice-giving situations expressly dealt with unconscionability. Nevertheless, some of the *Bundy* line of cases in Canada do link fiduciary obligation and unconscionability. Therefore, the appropriateness of this approach should briefly be considered.

Originally the rule about unconscionability simply meant that the court could rescind a transaction in which the inadequacy of the consideration was "so gross as to shock the conscience of any man".[96]

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[96] Gibson v. Jeyes, *supra* note 90, at 1048 (Eldon L.C.). *See also* Earl of Chesterfield v. Janssen, 28 E.R. 82 (Ch. 1750); S. WADDAMS, THE LAW OF CONTRACTS 326-407 (2d ed. 1984).

The function of the rule was to alert the court, on the basis of purely objective criteria, that the transaction involved more than met the eye. However, the value of this approach was subsequently diminished when courts focussed on the consideration alone by inquiring solely into the price of the bargain. In contrast, the modern revival of unconscionability owes much to the undoubtedly unintended return to the original thrust of the rule — the manifest inequality on the face of the transaction as evidence of some inequality between the parties which permits one party to influence the other to his advantage.[97] Thus, insofar as a modern doctrine of unconscionability has been articulated, it overlaps with unequal bargaining power and undue influence.

The question then becomes one of determining what role, if any, unconscionability should play in contemporary private law. Two answers have been proposed. Waddams argues that unconscionability is a doctrine which incorporates all the threads of unequal bargaining power and undue influence.[98] In so asserting he is, of course, expressing a visceral response: unfair transactions should not be enforced in law. On the other hand, Shepherd argues that there is no analytical place for a doctrine of unconscionability. Rather, it is descriptive of one class of undue influence cases in which grossly inadequate consideration carries significant evidentiary weight.[99] Shepherd's view is preferable not only because of its intrinsic merits but also because it is more effective in eliminating a doctrine which is parasitic on others and adds nothing to the analysis of unfair transactions. Although the original doctrine of unconscionability served a useful function, it now provides at most a starting point for legal analysis by directing attention to inherently questionable transactions involving grossly inadequate consideration.

V. CONCLUSION

The most obvious conclusion to be drawn from the foregoing analysis is that three differently constituted benches of the Ontario High Court have produced some confusion by their treatment of fiduciary obligation in relation to banks' advice-giving. Negligent misrepresentation, undue influence, unequal bargaining power and unconscionability, together with fiduciary obligation, are similarly defined, function more or less in the same manner and produce similar results. They interrelate, they overlap and they differ but they should not be confused. Rather, if the courts intend to develop a fiduciary dimension to the banker-customer relationship, they will need to decide whether its importation into the

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[97] *See* Harry v. Kreutziger, 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A. 1979).
[98] S. WADDAMS, *supra* note 96.
[99] J. SHEPHERD, *supra* note 11, at 242-43.

banker and customer context is really appropriate, clarify the meaning of fiduciary and distinguish it from other similar legal principles.

The question of appropriateness is very important. From a social and a commercial perspective it is not difficult to understand why the courts would attempt to import a fiduciary obligation into the banker-customer relationship. Traditionally, banking has been regarded as a financial business distinguishable in some mysterious way from all others. Historically, the banking mystique has been cultivated by the banks themselves with their ecclesiastical architecture, sanctimonious officers and air of deep mystery. Customers can hardly be blamed for taking them at their word. But should the courts? In both *McBean* and *Hayward* the Ontario High Court based its decisions on the traditional perception of banks: the belief that their activities are somehow "special" and, therefore, that there is something unique about their relationship with their customers. In attempting to integrate *Bundy* into the banker-customer context, the English textbooks refer to a "special relationship" as opposed to and superadded to the banker-customer relationship.[100] The courts' importation of a fiduciary duty into the banker-customer relationship is an intuitive attempt to encapsulate the mystique of banking and to hallow the banker-customer relationship.

However, this approach is no longer socially or commercially justifiable. The banks themselves have hastened their own demythologization both at the consumer and corporate banking levels. Banking services are advertised like soap powder and local branches are decorated to resemble discos and cafés. Banks are unrelentingly encroaching on areas of commerce traditionally monopolized by the other types of financial institutions and are actively lobbying for their own deregulation in order to permit competition with insurance and trust companies and securities brokerages. Banks would like to be "like everyone else" (or so they say) and they are being taken at their word.

Ironically, then, the importation of a fiduciary relationship into banking law is no longer appropriate. The special trust and confidence that the banks traditionally engendered, because they were thought to be special, cannot be sustained or justified once they are recognized for what they really are, just another type of business.

The legal ramifications are significant. The requirements of a successful action for breach of fiduciary duty are more stringent than those applied in negligent misrepresentation. Since *Hedley Byrne*, negligent misrepresentation requires only reasonable reliance and undertaking to create a duty of care, which is breached if the advice produces a loss. Today, the substantive content of that duty clearly includes any advice which causes loss. Thus, investment advice such as that given by the branch manager in *McBean* and *Hayward* will

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[100] *See, e.g.*, LORD CHORLEY & P. SMART, LEADING CASES IN THE LAW OF BANKING 17 (5th ed. P. Smart 1983).

frequently be given negligently because the advice-givers are unlikely to possess sufficient knowledge of or have experience with the ventures about which they recommend. Yet more than reliance and undertaking are required to create a fiduciary duty, as the decisions in *Standard* and *MacLellan* demonstrate. Loyalty, trust and confidence must be proved. Failure to do so will result in failure for the plaintiff, shielding banks from liability that would be imposed on other advice-givers. Paradoxically, the very advantages that, theoretically, fiduciary obligation should give a plaintiff, have been undermined by the changed nature of legal liability in advice-giving contexts since *Hedley Byrne.* Proving the existence of a fiduciary relationship creates an extra hurdle for the plaintiff which he may fail to surmount, as shown in *Standard.* Even when the relationship is established, additional complications arise whenever the rudimentary law of fiduciaries is invoked, such as confusion with similar principles, the conflict of interest rule and the conflicting relationship which a fiduciary duty owed to one party may create with respect to duties owed to others.

The argument that negligent misrepresentation should replace breach of a fiduciary duty in banks' advice-giving cases has one principle extrinsic shortcoming: negligence would then encompass the emerging law of fiduciaries, in addition to its other heinous crimes, such as murdering contract. Conversely, a reduced substantive content for fiduciary duty, perhaps requiring reliance and undertaking, could eventually consume the law of torts. However, these are issues which need not yet be faced. The argument made in this article is limited to the context of banks and advice-giving.

Of the three important decisions under consideration, the Ontario High Court decided the exotic cow cases correctly although for the wrong reasons. It erred in *Standard* because of this faulty reasoning. *Standard* tested the Court's understanding of the law concerning banks and advice-giving and found it wanting. More study is needed.