CORRELATIVE FIDUCIARY LIABILITY

BY

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The ultimate aim of this thesis is to demonstrate that the effect of applying a corrective structure to fiduciary obligations is edifying. Corrective justice is a bipolar relationship where each of the poles refers to individuals conceptually linked through the legal relationship between them. Because corrective justice is bipolar, the upshot of such an approach ought to result in the promise of greater integrity and clarity flowing from a renewed interest in the relationship between fiduciary and principal. Underlying this polishing of the fiduciary relationship is the long-held ambition for the fiduciary relationship not to suffer from ambiguity as a symptom of its expansion beyond the sphere of trusts.
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**Introduction**

The ultimate aim of this thesis is to demonstrate that the effect of applying a corrective structure to fiduciary obligations is edifying. Corrective justice is a bipolar relationship where each of the poles refers to individuals conceptually linked through the legal relationship between them. Because corrective justice is bipolar, the upshot of such an approach ought to result in the promise of greater integrity and clarity flowing from a renewed interest in the relationship between fiduciary and principal.

Underlying this polishing of the fiduciary relationship is the long-held ambition for the fiduciary relationship not to suffer from ambiguity as a symptom of its expansion beyond the sphere of trusts. Professor Weinrib noticed this inadequacy in an article from 1975, where he concluded that fiduciary relations ‘should not exist in an analytic vacuum’.¹ This thesis makes use of this early paper together with later works on corrective justice as inspiration. These works will drive an exploration of the possibility of filling this vacuum with an application of corrective justice on the liability segment of the analysis taken when fiduciary duties are owed, and then breached.

**Fiduciary liability**

To set out the characters at play, the legal relationship this thesis concerns is one built around the concept of utmost loyalty owed from the fiduciary towards the principal.² Deborah DeMott describes

² See for example Meinhard v Salmon (1928) 164 NE 545 at 546 [Meinhard].
loyalty as ‘fiduciary duty’s distinctive and animating force’. Therefore, loyalty is very much a loaded concept, and cases have historically differed on their understanding of its content. For example, some equate the duty of loyalty purely with a duty to avoid conflicts, while many others view it as a far more open-ended duty encompassing an obligation of good faith, and avoidance of profit making as well as conflicts. Shepherd depicts loyalty as a vessel containing specific duties, described as the no-conflict, no-profit and self-dealing rules. This forms the most widely accepted approach, since the common law has now embraced all of these rules as being applicable as a matter of course, in both overlapping and distinct fashion in England and in Canada.

All of these are more broadly expressed in practice by the idea of one party undertaking duties towards another ‘in circumstances which give rise to a relationship of trust and confidence’. Moreover, the proscriptive rather than prescriptive nature of fiduciary duties has often been stressed, which is why recourse to the three specific duties prohibiting conflict, profit and self-dealing is useful. The underlying rationale for the existence of this relationship involving fiduciary liability will be discussed in chapter one. Overall, it largely stems from inherent characteristics coupled with some external concerns such as deterrence, which will be discussed at length in the body of the paper.

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4 For example, Conaglen, in ‘The nature and function of fiduciary loyalty’ (2005) L.Q.R 452 at 461 [Conaglen], a conception that can be traced back to Bray v Ford [1896] A.C. 44 [Bray], where Lord Hershel distinguished between the duty of loyalty and the duty not to profit from one’s fiduciary position, at 51-52.
5 Bristol and West Building Society v Mothew [1998] Ch 1 at 18 [Mothew], per Lord Millett LJ.
7 In Soulos v Korkontzilas [1997] 2 S.C.R. 21 [Soulos] for example, the profit rule was breached but the conflict rule was not. More commonly, both will be breached and discussed in unison, as in Canadian Aero Service Ltd. v. O’Malley [1973] 40 DLR (3d) 371 [O’Malley].
8 Mothew supra note 7 at 19, per Lord Millett.
Correlativity

Although corrective justice will deserve far more exploration than a paragraph, the possibility of great synergy between fiduciary relationships as outlined above by Lord Millet, and Professor Weinrib’s penultimate proposition is striking. To illustrate this, part of Professor Weinrib’s lecture handout deserves reproduction:

‘The ground for protecting the right consists in the capacity of the parties, as self-determining persons, to form a legal relationship in which the right of one person is correlative to the duty of the other’. 10

Both the emphasis on the legal relationship between the parties and the correlation between rights and duties described by this proposition form the motivation for moving forward with this thesis. Firstly, fiduciary relationships arise between the parties, who as the quote reflects, have rights and owe duties to each other. Secondly, fiduciary obligations belong to the private law family, which corrective justice addresses. Thirdly, the quote also complements the idea illuminated in the Mothew case per Lord Millet, of loyalty being ‘undertaken’ on the facts, rather than externally imposed.

Aspirations for correlative fiduciary liability

The aim of this paper is to focus on the liability that occurs as a result of the correlatively structured relationship. Since ‘under corrective justice, liability is the juridical manifestation of the logic of correlativity’ 11, then concomitantly, applying correlative liability to fiduciary duties should allow for some interesting outcomes and ideas. These ideas will especially focus on fostering the conceptual

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10 Alternative Approaches Lecture Handout, Fall 2010.
soundness and feasibility of correlative fiduciary liability, because the fiduciary relationship has historically struggled to achieve such qualities.

The story of this thesis will begin in media res, being mainly interested in the relationship between the parties after a breach occurs. At this point in the timeline of the legal relationship between fiduciary and principal, it is key to ask how and why liability occurs. This is because, as will be seen, these questions are seldom asked, and the liability inquiry taken by courts has become a veritable façade. Much of the academic literature divides the uncertainties present in fiduciary obligations between the existence of a fiduciary relationship and the ramifications resulting from a breach of duties pertaining to that ultimately accepted relationship. This is convenient, and the vast majority of cases we will examine will focus on the latter category rather than the former.

Nonetheless, despite this attempt to close in on a specific point of interaction between the fiduciary and the principal, it is impossible to divorce the inquiry entirely from the former category concerning the existence of a fiduciary relationship. This is because without it the second category would be non-existent and irrelevant. As Professor Weinrib puts it, ‘litigation reflects deeply embedded intuitions about justice and personal responsibility’13, which means that it is difficult, if not disrespectful to the idea of justice, to crumble the relationship between the parties into individual snapshots without looking to the greater picture. This flows from the idea that ‘the rectification responds to…the injustice

12 For example, Professor Duggan is mainly concerned with the former and whether the relationship arises on the basis of consent or is imposed by law in part II and III of his paper, “Fiduciary Obligations in the Supreme Court of Canada: A Retrospective” [Duggan], online at <SSRN: http://ssrn.com/abstract=1600928>
that is being rectified’, and therefore the rectification must always be germane to the injustice committed by one party, here the fiduciary, against the other, the principal.14

**Justifying interweaving correlativity and fiduciary liability**

The first chapter will begin by discussing several key influences that have guided, or even controlled, the development of fiduciary obligations. Subsequently it will discuss which of these are sufficiently inherent to the relationship to be carried over into correlative fiduciary liability.

Before this can be done however, some key issues remain to be pointed out about the justification of meddling with fiduciary duties as they stand at present. Most apropos is Professor Weinrib’s article from 1975, which took an interest in the underpinnings of the fiduciary relationship, and is therefore an inquiry that inspires the theme of this thesis. Professor Weinrib wrote that the conceptual development of fiduciary law had received ‘piecemeal treatment’, which resulted in unsuccessful attention to ‘problems of policy’ in the conceptual legal foundation for fiduciary relationships.15 When it comes to justifying correlative fiduciary liability, Professor Weinrib made a paramount observation on the case law. It is embedded in the following passage, where he says that ‘the courts couple a declaration that the profit is tainted with a disavowal of the need to examine realistically the motive of the actor of the damage done to the claimant’16

Although not specifically framed in terms of corrective justice, the quote above highlights the relevance of this thesis and the real need to give thought to the relationship between the parties when

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15 Weinrib, “Fiduciary” *supra* note 1 at 1.
16 *ibid* at 2.
discussing or adjudicating fiduciary liability. This can be done in a way that gives due consideration to each pole of the bipolar relationship.

Weinrib comments that instead of focusing on the relationship between the parties, attention has been mainly on the factual element of profit-making as a justification for liability. Moreover, liability is justified with reference to broad and undefined concepts that will be discussed at further length in chapter four’s practical application, so that judgments appear more like a ‘ritual than a rational exercise’. The issue with such a ritual is that it fails to explain the need for policy in imposing liability between the parties. Professor Weinrib also noticed that the achievement that is the law of fiduciary obligations as we know it ‘has not been without its costs in terms of conceptual coherence’, operating instead on a makeshift foundation amounting to a ‘jungle of slogans’. This is why it is important to attempt to traverse this jungle first, in order to subsequently explore a correlative foundation for liability that will possess the rational quality that Weinrib discussed with respect to the fiduciary arena in his article.

Having just examined why fiduciary liability deserves a stronger conceptual foundation, the flip side of why corrective justice is a legitimate fit remains to be introduced. The question here is not what would be the upshot of correlative fiduciary duties, which will be addressed later, but rather whether we should be looking to corrective justice at all, given its prima facie absence from the fiduciary vocabulary that has dominated the relationship since inception. The answer to this goes back to the mention of coherence made by Professor Weinrib in his article with respect to fiduciary relationships. If this lacuna is accepted as a genuine problem that deserves a solution, then any foundation for change

\[17\] Ibid at 2-3.
\[18\] Ibid at 18.
\[19\] Ibid at 22.
suggested will need to see coherence as a central concern. Corrective justice meets this expectation, and more.

It must be remembered that although this thesis speaks of interweaving correlativity and fiduciary liability, correlativity is in no way a newcomer to the private law sphere, since it has been said to be ‘the central feature of private law’. 20 This feature justifies correlativity in the fiduciary sphere because each is as much a part of the private law family as the other, even though they have not widely been mutually connected. This thesis does not take its cue from movements like law and economics, which meld disciplines together to explore new foundations. Rather, it aims to examine what is already there but seldom discussed with respect to fiduciary liability. 21 To put it simply, we are peeling back layers of the fiduciary onion rather than adding new ones.

The first chapter will demonstrate that fiduciary law has struggled to find a conceptual basis for imposing liability. Lord Justice Millet has depicted fiduciary liability as ‘bedeviled by unthinking resort to verbal formulae’ rather than concrete principle. 22 This phenomenon in practice can be traced back to a lack of internal intelligibility. Professor Weinrib has pointed out that coherence is inherently tied to the idea of being part of a unified structure that ‘is greater than the sum of its parts’, which exist in harmony rather than independence. 23 If private law aspires to be coherent, then fiduciary duties can be part of this union and are therefore deserving of such internal intelligibility. This realization means

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20 Peter Cane, commenting on Weinrib’s writings on corrective justice, in “Corrective Justice and Correlativity in Private Law” (1996) 16 OJLS 471 at 471.
21 As such it is more aptly described as akin to works such as Rediscovering Negligence by Allan (London: Hart Publishing, 2007) which addressed the internal coherence of negligence law.
22 Mothew supra note 5 at 710.
more than a mere justification of pursuing correlative fiduciary liability. In sum, fiduciary duties are part of private law, and correlativity is the feature that ‘sets private apart from other kinds of ordering’.

The culmination of these attributes is that correlativity is not only a justified partner in union for fiduciary liability but also that, normatively speaking, it is part of its birthright and heritage.

Although the above illustrates that the correlative fiduciary overlay is legitimate, legitimacy is not a guarantee of complete compatibility. It may be that some features of fiduciary obligations conflict with correlativity to an extent that exceeds the features or family of private law they share. Or, it could be that finally viewing fiduciary liability as a ‘normatively distinct mode of interaction’ will fill the lacunae that Sir Anthony Mason deplored when he said that ‘the fiduciary relationship is a concept in search of a principle’.

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24 Ibid at 56.
25 Weinrib, describing private law, ibid at 2.
26 in P. Finn, Essays in Equity (Sidney: The Law Book Company, 1985) at 246.
Chapter 1: The nature of fiduciary liability: in search of intelligibility

So far we know that the fiduciary relationship is as sophisticatedly simple as it is vague in terms of predictability and conceptual palpability. Hence, discussing the nature of fiduciary liability is a somewhat elusive exercise. Elusive as it may be, it is worthwhile, both for the sake of the parties involved and for the conceptual foundation that is always at stake in justifying liability. Professor Weinrib asserted the importance of distinguishing private law ‘from other things and from the chaos of unintelligible indeterminacy that its identification as a something denies’. In the same way that private law is an identified something, the parts of the whole that exist within are all equally something as well. The aim here is to seek the intelligibility of fiduciary law to the extent that the ‘whatness’ of fiduciary liability is believed to be identifiable when external modes of ordering are abandoned.

Courts have purposefully avoided creating certainty in this legal relationship, as it has grown perhaps more popular and less defined in Canada than in any other common law country. Indeed, Professor Duggan has written that both the circumstances surrounding when a relationship will arise and the justifications for imposing liability have remained indeterminate in the Supreme Court of Canada. The resulting enormous scope of fiduciary obligations is apparent from Ogilvie’s humorous comment that in Canada its prevalence contends with that of death and taxes.

Although fiduciary obligations have become plagued with vagueness, this area has enduring characteristics, with some persisting more legitimately and beneficially than others. The following sections will demonstrate that morality and the related view of deterrence that has been taken by courts

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27 Weinrib, Private Law, supra note 23 at 26.
28 Duggan, supra note 12 at 28.
tend to treat the parties, and the subsequent liability between them, as instrumental. This is in contrast to the spirit of corrective justice, which acts as a ‘counterweight to instrumental conceptions of private law’.

**Morality**

There are two possible ways of achieving moral outcomes relevant to fiduciary liability. This section will suggest that although the former, and more commonly encountered external morality, is not compatible with correlativity, the latter internal aspiration is both compatible and beneficial.

The immaterial nature of morality to fiduciary obligations has been denounced in several well-known cases such as *Bray v Ford*, where Lord Herschel made clear that liability occurs on a foundation other than ‘principles of morality’, a comment that was noted with approval in the more modern *Boardman v Phipps*.

However, despite the unequivocal ousting of morality by the common law, it has remained insidiously in the vocabulary of many academics and judges. On the one hand, in adjudication Chancellor Blake in Canada described strict liability in the fiduciary sphere as based on principles of ‘morality and of public policy’, having a foundation ‘in the very constitution of our nature, for it has been authoritatively declared that a man cannot serve two masters’. On the other hand, Professor Samet’s academic writings continue to consider the ‘immorality’ and breakdown of internal moral restraints of the fiduciary not only relevant, but also determinative, in establishing when liability should occur.

Moreover, in commenting on dicta from *Bray v Ford*, Matthew Conaglen observed that using morality

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30 Weinrib, “Corrective Justice” *supra* note 13 at 403.
31 *Supra* note 4 at 51.
32 [1967] 2 A.C. 46 at 111 and 123 by Lords Hodson and Upjohn respectively [*Boardman*].
33 *Toronto (City) v Bowes* (1854), 4 Gr. 489 at 503-504.
34 “Guarding the Fiduciary’s Conscience; A Justification of the Profit Stripping Rule” (2008) 28 OJLS at 763 at 764 -765 [*Samet*].
as a basis for fiduciary liability is a strange contradiction given that liability is often found in circumstances where the fiduciary acted in good conscience despite the taint of a possible conflict.\(^{35}\) Hence it is perhaps more accurate to say that external morality tends to be concerned with the possibility of immorality in general rather than the mindset of the actual defendant.

The first use of morality is depicted by Samet above, who sees it as an external justification that has little to do with the duties owed between fiduciary and principal. External morality then, aims to determine both the presence of a fiduciary relationship and liability through an external policy on what those duties and rights ought to be for the good of everyone, and what liability should result if these are not respected. The tendency to use morality as an instrumental foundation to build a theory of fiduciary liability upon is longstanding, and appears in several cases such as *Parker v McKenna*, which perceived the fiduciary duty itself as ‘founded upon the highest and truest principles of morality’.\(^{36}\) *Parker v McKenna* displays the classical English law ‘harsh’\(^{37}\) approach, which refuses ‘evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury’.\(^{38}\)

Although the influence of such a conception of morality is perhaps not immediately evident from this quote, it is considerable when applied to liability. On this standpoint, morality will inform both when a relationship of loyalty will arise, and what is required from the fiduciary when it does. Being concerned with the mindset and actions of the fiduciary, it aims to decrease unwanted behavior rather than create just outcomes, as is apparent from Cardozo’s concern over the fiduciary’s ‘honor the most sensitive’

\(^{35}\) Conaglen *supra* note 4 at 472-473.

\(^{36}\) (1874) L.R. 10 Ch. App. 96 at 118 [*Parker v McKenna*].


\(^{38}\) *Parker v McKenna* supra note 36 at 96.
globally, rather than the rights and duties owed between the parties in situ.\textsuperscript{39} In sum, Professor Weinrib’s assertion that ‘moral argument, no less than economic argument, can be external to the law’s self-understanding’, most definitely applies when describing the development of fiduciary liability according to moral goals.\textsuperscript{40}

Internal morality however, is a quality that makes a key appearance in both Kant’s and Weinrib’s accounts of rights and duties. It is best described by Professor Weinrib’s quote that ‘tort law reflects the morality distinctive to the relationship of doing and suffering harm’.\textsuperscript{41} If morality is a distinctive feature of tortious correlativeity, then correlative liability between fiduciary and principal must have the same capacity. Characterized in this way, morality is devoid of the defendant focus that featured in \textit{Parker v McKenna} above. Internal morality only can allow courts to ‘fulfill a properly adjudicative function’ between fiduciary and principal, because looking to the defendant’s moral qualities alone does not address his correlative relationship to the plaintiff.\textsuperscript{42}

Morality is not and should not be optional to a correlative account of fiduciary duties, because the breach of duties being investigated cannot be treated as a ‘morally neutral’\textsuperscript{43} incident. Breach of the duty of loyalty by definition will never be morally neutral. The wrong is always morally salient, but that is not the same as saying that morality is the basis for the duty in the first place, since ‘evil and

\textsuperscript{39} Meinhard supra note 2 at 546.
\textsuperscript{40} Weinrib, \textit{Private Law} supra note 23 at 49.
\textsuperscript{41} Ernest J. Weinrib, “The Special Morality of Tort Law” (1989) 34 McGill L.J 403 at 403 [Weinrib, “Morality”].
\textsuperscript{42} Ibid at 409.
need are moral categories’ that are immaterial in determining liability.\textsuperscript{44} An internal account links 

morality to the rights and duties themselves, and this is apparent from Kant’s quote that rights amount 
to ‘moral capacities for putting others under obligations’.\textsuperscript{45} On this understanding, morality is a 
conceptual explanation of rights, rather than a reason to have them in the first place, since ‘all self-
determining beings…have equal moral status’\textsuperscript{46}. Moreover, Allan Beever notes that corrective justice 
‘refers to an area of interpersonal morality that both defines rights persons possess against each other as 
individuals and elucidates how one should respond to the violations of those rights’. Corrective justice 
is then morality between the parties, and so it is hardly surprising that correlative relationships 
themselves will exhibit internal morality when liability occurs.\textsuperscript{47}

The difference between internal and external morality is reflected in the one sided approach of the 
latter. While external morality traditionally looks only to the defendant fiduciary when informing 
liability, internal morality is a special and distinctive structure that focuses on a quality of the bipolar 
relationship rather than the mindset of one of the parties.\textsuperscript{48} It is a far subtler player than its external 
version, but can be seen in the case law already upon close inspection.

In \textit{Aberdeen Railway Company v Blaikie}, a fiduciary was liable in a situation where there was a conflict 
between the duty owed to his principal and his own personal interest.\textsuperscript{49} Internal morality does not figure 
patently in this liability interaction, but it is nonetheless present as an undertone guiding the imposition 
of liability when duty and right collide. It most clearly shines by its absence, when considering the

\begin{thebibliography}{99}

\bibitem{ibid} \textit{Ibid} at 352.
\bibitem{weinrib} From Weinrib, “Gains and Losses” supra note 11 at 291, where he references Kant, \textit{The Metaphysics of Morals} (Mary McGregor trans, 1991) at 63.
\bibitem{weinrib2} Weinrib, “Gains and Losses” supra note 11 at 292.
\bibitem{beever} Beever supra note 21 at 56.
\bibitem{weinrib3} Weinrib, “Morality” supra note 41 at 410.
\bibitem{conaglen} See Conaglen supra note 4 at 461.
\end{thebibliography}
alternative of allowing the fiduciary to set whatever transactional price is most advantageous to him. This scenario makes clear that immorality makes a conceptual appearance when the correlative duo of duty and right is forgotten. The title of internal morality reflects the idea that morality is internal to the relationship rather than imposed as a justification for liability, in that rights create moral obligations to refrain from infringements.50

To conclude this section, we acknowledged above that the aim of this chapter is to increase intelligibility by comparing fiduciary duties with correlativity. Looking at the way morality has been applied, the controlling and defendant-focused role it has taken on cannot be said to be part of the form of fiduciary liability. This is because morality is not a principle that makes fiduciary liability ‘what it is and differentiates it from what it is not’.51 Since it is not internal to fiduciary form in this way, then it must be external, in the same way that the law of contract or fraud would not belong to fiduciary form. Internal morality however, complements the form of fiduciary duty because it qualifies rather than dictates.

Deterrence

Deterrence forms the basis for most decisions and arguments in favor of liability between the parties, and is most often invoked when attempting to justify strict liability when no harm or detriment occurs to the principal. The result is that deterrence and strict liability are intertwined and both equally important in the feasibility of correlative fiduciary liability.

50 Weinrib, “Gains and Losses” supra note 11 at 291.
51 Weinrib, Private Law supra note 23 at 26.
To understand why deterrence is important, what is to be deterred must be made clear. There are several ways of putting this, and academic discussion has sometimes varied in the emphasis chosen, but most would agree that the central aim of deterrence is to deter misuse of discretion in some shape or form. The relationship between deterrence and discretion is complicated. In certain cases it can be said that there was no discretion towards the principal at all, and yet deterrence is used as a justification for liability anyway. Professor Weinrib identifies the famous Boardman v Phipps as such a case.

Given that the end result to both principal and defendant was one of considerable profit, where was the wrong? The court acknowledged the difficulty of dealing with the ‘incentive to profit’ in such a penalizing way given the lack of wrong committed, but concluded in favor of liability despite this. The lack of resolution to the court’s approach to policy was reflected in the allowance based on merit given to the fiduciaries in Boardman, who ordinarily should not have received anything. There is very little weighing of interests that goes on in Boardman and its cousins, which favor a view of liability as a ‘blunt instrument’. In Boardman and many other prominent cases, the ‘by reason of the fiduciary obligation test’ is not cohesive with the overall inquiry that must be made because it ‘presupposes that there is a fiduciary obligation and asks whether it was violated by the behavior at issue’. Moreover, Weinrib points out that liability even occurs in relationships that were never of a fiduciary nature, such as Coy v Pommerenke.

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52 See, for example Weinrib, “Fiduciary” supra note 1 at 16, where he says that ‘the courts have been zealous to deter improper exercises of discretion by a fiduciary’.
53 ibid at 7-8.
54 ibid at 19.
55 Ibid at 20.
56 Ibid at 20.
57 Ibid at 9.
58 ibid at 13, (1911) 44 SCR 543.
The issue of whether deterrence is a hindrance to correlativity in fiduciary liability is a complex one. A good starting point is Ripstein’s Kantian observation that ‘the law is effective if and only if conduct inconsistent with it will be hindered, whether prospectively through an incentive, or retrospectively by upholding it’. The dialogue between Professor Weinrib and Professor Schwartz reveals the nexus of corrective justice and deterrence astutely. Professor Weinrib conceives of deterrence as problematic when combined with corrective justice, not least due to the importance of relationalism to the latter but not the former. Conversely, Gary Schwartz’s work does not perceive the nexus between deterrence and corrective justice as conflicting. Instead, he finds fodder in Kant’s argument for the idea that a mixed theory is not only possible, but also rationally compatible.

While both scholars focus on tort law in their articles, the perspectives offered are apposite to the fiduciary field because if anything, it is subject to even stronger deterrence arguments. Although Professor Schwartz does not determine an absolute recipe for the proportions of deterrence and corrective justice that such a mixture would contain, looking at dominant accounts on the subject, it is likely that in the fiduciary arena, any current mixture would be made up of a greater proportion of deterrence than corrective justice.

We discussed the bipolar nature of corrective justice above. Can this bipolar character be compatible with the more single-minded deterrence justification? Arguably not, because while corrective justice focuses on the legal relationship between the parties, ‘deterrence can be applied independently to each

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of the parties’. 62 Practically, much like external morality, deterrence will always be far more concerned with the fate of the wrong-doer rather than the wrong-sufferer. This is clear from practice as well as theory. In *Boardman v Phipps*, the relationship between the principal and fiduciary was barely considered, even in the liability inquiry. Once the case is before the court, the focus is on the fiduciary liability of the defendant, but not often with respect to the claimant personally. Much broader policy considerations tend to trump such a relational inquiry. Indeed, the quote by Posner discussed by Professor Weinrib is as applicable to fiduciary liability as it is to tort that restitution being paid ‘to the plaintiff is from an economic standpoint, a mere detail’ 63.

Again, *Boardman v Phipps* is a stark example of how defendant minded deterrence operates in practice. The House of Lords awarded a discretionary award for the fiduciaries as a kind of token, the legitimacy of which was never considered. If liability is to be imposed correlatively between the parties, then looking only at the merit of the defendant is not a legitimate consideration for the court, because it does not reflect any aspect of the liability relationship between the parties. If the hard work and good faith of the fiduciary was to be relevant, then it ought to have been considered when determining whether there was any relationship between the parties at all, which subsequently gave rise to liability.

The *quantum meruit* award can be said to be distributive justice in disguise, because it looks to only one party, and has no grounding in fiduciary duties at all. Since Professor Weinrib states that ‘the plaintiff’s need and virtue are not reasons for requiring anything’ 64, then perhaps we can also say that that the defendant’s need, virtue, or merit based on hard work, are not reasons for allocating anything

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63 *Ibid* at 627.
64 Weinrib, “Gains and Losses” *supra* note 11 at 281.
either, unless it can be referred back to the correlatively structured relationship between the parties. The role of the judge is ‘to undo the injustice of the correlative gain and loss’. If this is done successfully, then there should be no need for awards based on merit, because after the remedy is ordered, the parties are situated where they should be: equally.

In sum, deterrence as an external justification of liability can be said to be inconsistent with the place of fiduciary obligations in the private law sphere. Conceptually, private law is not meant to focus externally on ‘the interests of the community as a whole, but on a bipolar relationship of liability’. In determining liability, deterrence does not look to the actual principal who has been wronged, but rather to the abstractly imagined long line of wronged parties who will come after the current claimant. In doing so it is incapable of respecting the bipolar relationship of liability that Professor Weinrib mentions in his conception of private law. Deterring breaches of fiduciary duties is a ‘favored social goal’, to the same extent as any other goal superimposed on this area of private law would be. If the ‘purpose of private law is simply to be private law’, and fiduciary law can concordantly be said to be a self-aware member of the private law family, then social goals such as deterrence ought to be extraneous to determining liability.

Professor Weinrib considers the possibility discussed by Chapman that correlativity and deterrence could be grouped together as two pillars of a ‘super-value’ as implausible. Professor Schwartz referred to a treatise by Prosser that stated that deterrence ‘seldom’ controls the rules of tortious

\[65\text{ Ibid at 282.}\]
\[66\text{ This assumes of course, that once the courts order a remedy, it is able to be collected, but that is beyond the scope of this thesis.}\]
\[67\text{ Weinrib, Private Law supra note 23 at 2.}\]
\[68\text{ Ibid at 4.}\]
\[69\text{ Ibid at 21.}\]
\[70\text{ Weinrib, “Deterrence” supra note 60 at 629.}\]
liability. In contrast, in fiduciary relationships, it tends to be king compared to other considerations. On such a normative understanding, the deterrence pillar would necessarily dwarf the corrective justice one, and topple the roof of the overarching value. The answer then must not be a new value to redefine everything, but rather a new understanding to re-examine the relationship between both of these justifications.

The only hope for reconciliation appears to rest with a sequenced, correlative argument whose cycle includes a deterrent element. As Professor Weinrib writes, Kant left open the way for this. Although a Kantian view of rights ‘rejects the view that deterrence informs the norms of a liability regime’, it nonetheless leaves open a ‘necessary function’ for deterrence. This function is to be differentiated from that of the conceptual right, which forms another part of the ‘multistaged process’. Under this understanding then, deterrence is not an instrument used to define the spheres of wrongs or rights, an important fact that separates this conception of deterrence from an economic one. The role of deterrence in the multistaged argument is rather to be conceptually subsequent.

The exercise of accepting deterrence into any correlative relationship, whether it be fiduciary or not, appears difficult upon first glance. However, after much thought it appears as if Professor Schwartz’s ideal as continued by Professor Weinrib is not only easy to accept, also but indispensable to include in creating a feasible conception of correlative fiduciary liability. Up until now, the circular graphic that appears on the cover page of this thesis has been neither labeled nor explained, but now the

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71 Schwartz, “Mixed Theories of Tort Law: Affirming both Deterrence and Corrective Justice” (1997) 75 Texas L.R 1801 at 1804 [Schwartz].
72 Weinrib, “Deterrence” supra note 60 at 633.
73 Ibid at 637.
74 Ibid at 638.
time has come to discuss it. The circular shape marks the realization that the only way for correlative fiduciary liability to function is to conceive of it as part of a circle of justice that continues infinitely and seamlessly. The circle works because it allows corrective justice approaches to take the lead by respecting the internal normative relationship between the parties.\(^{75}\)

Professor Schwartz noticed that when corrective justice and deterrence are allowed to co-exist in this way, the deterring effect that negligence law achieves itself becomes a means of furthering justice.\(^{76}\) Such a circle of fiduciary liability would also be perfectly in accord with Kant’s tenets on rights, which express freedom through the idea that rights protect us from being ‘a mere means for others’\(^{77}\) either personally or proprietarily, where the fiduciary would make use of the principal as a means to obtain profit, property or advantage.

Deterrence appears in the circle as a form of disincentive of breaches of the duty of loyalty.\(^{78}\) This sequenced view welcomes both deterrence and correlativity, but in a partnered rather than overlapping way.\(^{79}\) As such, it respects the wish of fiduciary theorists\(^{80}\) to create a system of fiduciary liability that deters unwanted conflicts, but remembers that doing justice between fiduciary and principal requires correlativity in the segment of the circle of justice that addresses loss. However, this form of deterrence does not dictate the presence of wrong in the way that was seen in \textit{Keech}, because deterrence does \textit{not} form the justification ‘for a judgment about the lack of wrongdoing at the first stage’.\(^{81}\) In proposing a partnership between deterrence and corrective justice that conceptually threatens neither, Professor

\(^{75}\) \textit{Ibid} at 625.
\(^{76}\) Schwartz \textit{supra} note 71 at 1831.
\(^{77}\) Weinrib, “Deterrence” \textit{supra} note 60 at 633.
\(^{78}\) \textit{Ibid} at 633.
\(^{79}\) The circle mentioned is inspired by professor Weinrib’s determination that ‘unless one keeps the stages of Kant’s argument separate one can make no sense of Kant’s argument’ at 636 \textit{Ibid}.
\(^{80}\) For example, Conaglen \textit{supra} note 4.
\(^{81}\) Weinrib, “Deterrence” \textit{supra} note 60 at 636.
Schwartz helped to make the presence of correlative liability in deterrence heavy areas feasible. Since in ‘requiring potential defendants to consider the prospect of liability’ deterrence still has a place in the circle, it negates the possibility that correlative fiduciary liability will be less effective than its traditional counterpart.

**The relationship between deterrence and morality**

Building on an article by Joel Feinberg, Professor Schwartz also emphasizes the crucial connection between deterrence and morality, quoting that the aim of deterrence is ‘not merely to minimize harms’ but rather to prevent those harms…that are also wrongs’. In a way then, deterrence is the hand of morality, since the former preventative spirit aims to discourage incursions against the latter. It is this facet of deterrence that leads Gary Schwartz to conclude that in tort law, it forms an ‘objective that includes and reconciles economic and ethical approaches’. Deterrence then, is more than the face of utilitarianism in practice.

Unfortunately, in the historical evolution of fiduciary liability, the morality-deterrence duo has not had the harmonizing effect that Schwartz’s ideal suggests. Instead, acting to complicate liability for an otherwise sophisticatedly simple bipolar relationship. This is an important realization because it goes back to the idea of fiduciary duties as part of the private law sphere. In the same way that it is ‘normatively inadequate if it is understood in terms of independent goals’, fiduciary liability suffers

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82 Ibid at 639.
84 Schwartz ibid at 1833.
85 Weinrib, *Private Law supra* note 23 at 42.
from incoherence and unpredictability because of the independent goals that are used to justify liability between the parties.

This notion crystallizes the point that deterrence and morality can often operate simultaneously to shape liability, and indeed have acted particularly vehemently in the fiduciary arena. We saw above that external morality as an instrumental concept aims to both create a moral foundation for fiduciary liability, and determine the liability of the defendant based on the immorality of his wrong without recourse to the relationship between him and the sufferer of his wrong. Deterrence has historically accompanied external morality because it is part of the independently justifiable goal that morality encourages.  

Hence, the deterrence-morality partnership is far ‘from the internal mode of justification represented by corrective justice’. While deterrence and morality may appear to be sufficient as a justification to penalize the defendant, these justifications ignore his relationship to the plaintiff principal. External morality and subsequent deterrence are an antithesis to these results.

**Rights and wrongs**

What is the principal entitled to? Is the duty of loyalty a right, the breach of which imports a wrong? Ripstein discusses three categories of Kantian rights that ‘interfere with external freedom’: property, contract and status. This third category, which Kant referred to as a domestic right, covers relationships such as that between fiduciary and principal, where one party ‘is not in a position to consent either to the existence of that relationship or to the modification of its terms’. This feature

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86 Conaglen *supra* note 4 at 464.
87 Weinrib, “Morality” *supra* note 41 at 413.
88 Weinrib “Gains and Losses” *supra* note 11 at 290.
89 Ripstein *supra* note 59 at 65.
90 *Ibid* at 70.
91 *Ibid* at 73.
explains Professor Weinrib’s definition of the fiduciary relationship as characterized by a combination of great discretion held by one party respective to another who is vulnerable under it. The wrong in status arises when you use the relationship with that other person to advance your private ends, as would occur when a fiduciary pursues a conflicted opportunity, forsaking his or her duty of loyalty. This reference to vulnerability however, should not be taken as a justification for liability. In the same way that ‘considerations like wealth, need and character’ are not a basis for connecting the parties in liability, the vulnerability of a particular plaintiff will not create an obligation to restitute him independent of some breach towards him. Status rights are ‘inherently’ asymmetrical, and generate interdependent rights and duties, which are in contrast to contractual bargains. When such a right is breached, the wrong is correlative between the parties. The breach of the duty of loyalty then, is a wrong done as against the principal. It is not just a wrong committed by the fiduciary, or as Ripstein writes, it ‘is not merely to do something, but to do something to that person’. Hence, we can speak of a right to loyalty rising from the fiduciary relationship.

**Consent**

The case law on fiduciary duties has traditionally placed great emphasis on consent as a panacea for conflicted transactions and generally wrongful conduct on the part of the fiduciary. This is important because the issue of consent is part of the conception of legal relationships put forward by Kant. Remembering what was said above by Ripstein’s account of Kantian rights, consent in a status

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92 Weinrib, “Fiduciary” supra note 1 at 7.
93 Ripstein supra note 59 at 76.
94 Weinrib, “Gains and Losses” supra note 11 at 281.
95 Ripstein supra note 59 at 79.
96 *Ibid* at 109
97 Weinrib’s paper “Poverty and Property in Kant’s System of Rights” (2002) 78 Notre Dame L. Rev. 795 offers interesting insights on this in a different context.
relationship should be limited, because it is the lack of consent that separates status relationships from contract ones. Acts done by the fiduciary then, ‘are limited to those that the other could have consented to, had he or she been in a position to’. \(^98\) Interestingly, Kant’s philosophy determined that in the absence of consent, even if there is no tangible harm, there might still be a wrong done to those who have not consented. \(^99\) This notion will be returned to later when we discuss wrongs and losses to a more detailed extent.

**Prophylaxis and corrective justice**

The overwhelming aim of fiduciary liability is often said to be prophylactic. What does this mean, and is it substantially distinct from the deterrent mode of ordering discussed above? Prophylaxis is a method of protection against an increase in wrongs committed towards principals. Arguably, prophylaxis is not an externally imposed goal, but merely a title, which reflects the natural result of liability between the parties. According to Conaglen, ‘the very nature of fiduciary doctrine, as opposed merely to its methodology, is itself prophylactic in the sense that the very object of its rules and principles is to try to remove or neutralize incentives’ \(^100\) that lead the fiduciary astray from his duties. It is vital to notice that the duties he is straying from in this quote are not those owed to the actual principal he ought to be loyal to, but rather to principals in general. Prophylaxis is the inexorable rule that aims to decrease risk as a policy goal, where the risk is one of the fiduciary favoring his own interests by breaching his duties. \(^101\) As such, prophylaxis also acts as an externally imposed goal, and arguments that it is characteristic of fiduciary liability are void.

\(^{98}\) Ripstein *supra* note 59 at 110.

\(^{99}\) Ripstein *supra* note 59 at 22.

\(^{100}\) Conaglen *supra* note 4 at 469.

\(^{101}\) Parker and Mellows *supra* note 34 at 336.
Professor Ripstein’s insights on Kantian theory offer some further illumination. If the effect of prophylaxis is to hinder a formal wrong, then it is consequential that liability must be strictly unwavering, even in the face of good intentions or best interests. Kant’s claim that the law governs ‘what ought to happen rather than what does happen’ fits well with corrective justice because it complements fiduciary strict liability. Factual evidence of no harm to the principal could be used if liability were concerned with what did happen, but it is not relevant if liability is concerned over what ought to happen. What ought to happen is for the fiduciary not to profit from a conflicted opportunity, and that is where the inquiry ends.

The form of fiduciary liability: conclusions so far

The above has shown that fiduciary liability is indeed in need of some tender loving conceptual care. Professor Weinrib describes coherence as ‘a unified conceptual structure, the constituents of which express a single idea’. The above has shown that although there are some dominant ideas that have strongly influenced the evolution of fiduciary duties, such as deterrence and morality, neither of these creates, or aims to create a unified conceptual structure. The most that can be said is that an ‘idea’ has been to disgorge the fiduciary of any wrongfully acquired gain, but that this has not been done in a ‘unified conceptual’ way, but rather more haphazardly in order to achieve certain factual outcomes. Hence the result, as is often hinted at by judges, is not coherent, and leaves an opening for a new architectural structure to support the existing relationship of loyalty that defines fiduciary obligations.

102 Ripstein supra note 59 at 314.
103 Weinrib, “Corrective Justice” supra note 13 at 416.
This realization begs the question however, of whether fiduciary liability can survive in a formalist world, stripped of all external instrumentalism and policy. Abandoning all of external morality and the imposed goal of deterrence, as the above suggests, will strip the liability inquiry of many of its assumptions and reasoning mechanisms. Although later chapters will only truly be able to judge whether the correlative core of fiduciary liability is feasible, what we have outlined so far leaves us with the question of what this core actually is.

Some commentators such as Allan Hutchinson have previously attacked corrective justice for creating ‘a notion of abstract rationality at the expense of political and social responsibility’.104 While defending corrective justice against this accusation is both unnecessary and beyond the scope of this paper, this comment can be used to question the nucleus of fiduciary liability obtained so far by using a correlative mindset.

Leaving morality and deterrence aside, one is left with two parties who still bear the title of fiduciary and principal. An undertaking of complete loyalty owed from the former to the latter legally joins these parties. This obligation of loyalty is a multifaceted one, which contains multiple specific duties to avoid conflicts, profits and self-dealing. We also know that liability is not an independent event, but rather that it happens between plaintiff and defendant in such a way that must connect them. A breach of loyalty at large does not entail liability, nor does liability occur from defendants who do not owe a fiduciary duty with respect to a certain event, time or person. There must be a meeting of duty owed and rights gained, and wrong done and wrong suffered, for liability to occur. Considerations of external morality or deterrence will not cause liability to occur in this form of fiduciary liability. Internal morality however, describes the special morality of the correlative fiduciary relationship, and is inherently part of the fiduciary form. Moreover, corrective justice does not ignore its responsibilities as

Hutchinson suggests, because deterrence forms a subsequent part of the circle of justice without disrupting correlative liability.

Is there a coherent form left to such a fiduciary relationship and liability? According to Professor Weinrib, finding form necessitates ‘differentiating between the attributes that are definitive of the thing and those that are merely incidental’. Detaching the definitive from the incidental is difficult in fiduciary liability, because the incidental has taken root, and historically even defined, the development of the law concerning the definitive.

Form encompasses three key elements: character, kind and unity. There is little doubt from the cases discussed above that fiduciary liability exhibits greatly distinctive character from other modes of ordering or areas of private law. Indeed, Maitland once pronounced it to be common law’s most unique creation. It exacts a higher standard, and results in more severe liability, than any other area of private law. Moreover, the close association between fiduciary and principal, as well as the distinct duties owed and rights received, give it the character of a private law mode of ordering. Having eliminated extraneous goals from the fiduciary relationship, we are left with a unified relationship that promises greater coherence.

A coherent concept of fiduciary liability will be founded upon considerations that justify the features of the relationship. In order for fiduciary relationships to cohere, the features themselves must cohere through their mutually linked considerations. The fundamentals of the fiduciary relationship do indeed. Fiduciary duties can be expressed as an obligation of loyalty, owed from one party to another,

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106 *Ibid* at 28.
either through the nature of the relationship\textsuperscript{109}, or by virtue of an undertaking between them. Within loyalty reside more specific duties each of which is an expression of behavior that reflects a negation of the duty itself. Owing a duty of loyalty means avoiding conflicts, profits and purchases that are not in the sole interests of the principal. In turn, the principal has a right for all of these duties to be fulfilled, and can hold the fiduciary accountable if they are not, unless consent has successfully been given.

Much of the academic discussion on fiduciary liability that has been discussed so far suggests a current fiduciary relationship that encompasses everything but the kitchen sink. In his book, Profession Weinrib used a table as metaphor to illustrate an object that exhibits unity, character and kind.\textsuperscript{110} If we use the same metaphor, and apply it to fiduciary duties, we see a table that is stacked high with applications and perilously built on legs of different lengths. Having sawed these legs to a more even measure, it is now time to move forward with correlative fiduciary liability.

\textsuperscript{109} For example, Trustee-Beneficiary or Solicitor-Client relationships.

\textsuperscript{110} Weinrib, \textit{Private Law supra} note 23 at 76.
Chapter 2: Corrective justice as an explanation for fiduciary liability

This chapter is where corrective justice will truly come into play, and hence where the link between the inherent elements discussed in the previous chapter will be made and any inconsistencies pointed out and discussed. While the previous chapter focused on fiduciary liability as existing within the sphere of private law, this chapter will take a closer look at how correlativity explains fiduciary liability. In doing this, the focus will also be on the conflicts that may exist between correlativity and fiduciary liability. A particular emphasis on remedies will be introduced into discussion, given the central role that these play in fiduciary liability. We know that corrective justice acts as a descriptor ‘of the form of the private law relationship’.\(^{111}\) We also know that the question of private law concerning ‘what entitles a specific plaintiff to sue and recover from a specific defendant’\(^{112}\) in fiduciary relationships refers to an obligation of loyalty that has been breached. What is yet to be explored is how corrective justice can grapple with, or inform, the liability segment of the fiduciary form.

Correlative basics

The terminology of corrective justice tends to coincide well with that of fiduciary liability. For example ‘Aristotle repeatedly describes the two parties to corrective justice as being active and passive with respect to each other’.\(^{113}\) Hence the active party will be the fiduciary, and the passive party will be the principal. Again, the bipolarity of corrective justice is harmonious with the fiduciary-principal approach in fiduciary law.

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\(^{111}\) *Ibid* at 56.
\(^{112}\) *Ibid* at 56-57.
\(^{113}\) Weinrib, “Corrective Justice” *supra* note 13 at 410.
One of the most unique and salient characteristics of corrective justice is the bipolar approach to liability taken, whereby ‘a remedy directed at only one of the parties does not conform to corrective justice’. It appears at odds with the attitude focusing on the possibility of conflict that has always been taken in cases like *Keech v Sanford*. In this case, whose reasoning was as foundational as it was concise, Lord King established liability on the basis of the idea that the trustee ‘should rather have let it run out, than to have had the lease to himself’ simply because ‘it is very obvious what would be the consequence of letting trustees have the lease’. In this case, we see an approach both of strict liability, which will be discussed below, and one of identifying liability through the concept of a possibility of conflict. At the time that *Keech* was decided, there could be said to be a legitimate ‘right to expect’ the renewal of a lease. This historical quirk soon changed, but the rule did not, and so to this day the English common law maintains that a real conflict, or wrong is not actually necessary for liability to occur.

Applying Kantian rights and Aristotle’s thinking together, then between the fiduciary and the principal ‘the disturbance of equality’ is reflected in ‘the defendant’s wrongful infringement of the plaintiff’s rights’. The infringement in fiduciary liability occurs when, for example, the duty to avoid conflicts is breached. Both the disturbance of equality and the infringement are correlative, in that the duty breached results in a benefit obtained, which correlates with a wrong done to the plaintiff concerning the duty that was owed. On this understanding, unlike in *Keech*, the remedy re-instating equality will not take the form of a general measure instilling deterrence of future conflicts, or risk of future harms.

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115 [1726] EWHC Ch J76.
116 *Keech* at 175.
117 Parker and Mellows *supra* note 37 at 358.
to other infant principals. Equality is achieved by looking at what was owed and expected between the parties.

The fiduciary’s gain is the principal’s loss?

Given the importance of establishing equality between the parties, gain and loss are key pieces of the correlative relationship between fiduciary and principal. It was mentioned above that in correlative terms, the fiduciary’s gain must reflect the principal’s loss when the two are united at the nexus of a correlative relationship. The complication stems from the unique nature of fiduciary liability. While Aristotle conceived of correlativity as an embodiment of ‘transactional equality’, fiduciary liability is different. It involves an undertaking of liability, but this feature is difficult to reduce into transactional terms, because loyalty is an obligation that is subtler and more personal than most legal transactions. Generally once liability is found, fiduciaries will be required to restitute principals, and when a gain has occurred, it can be ‘subjected to the remedy of constructive trust, or the fiduciaries to a personal remedy, or both, as occasion warrants’. Professor Weinrib’s assertion that restitution prima facie seems problematic ‘because the law grants plaintiffs what they never lost’ is enhanced in fiduciary liability.

What does this mean in practice? If the deprivation of a due is ‘suffering of a wrong’, then what is that due? It could mean that if X is some monetary value, then a fiduciary gaining X amount from breaching his duty of loyalty must also cause a loss to the principal of this same value of X. Otherwise

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119 Ibid at 57.
120 Waters, Law of Trusts supra note 9 at 434.
121 Weinrib, “Gains and Losses” supra note 11 at 278.
122 Weinrib, Private Law supra note 23 at 59.
liability cannot be correlative structured, because the liability part of the inquiry would not reflect the bipolar, correlative structured relationship that comes before it.\textsuperscript{123} The above formulaic scenario would make a correlative fiduciary relationship impossible however, because in fiduciary relationships the loss caused is often of a dramatically different quantum than the gain. Indeed the gain that is subsequently disgorged is often exponentially larger than the loss, which can sometimes have a value close to zero in circumstances involving a corporate opportunity that is pursued to fruition by the fiduciary who acts in breach of duty.

Although some disagree\textsuperscript{124}, it is clear that only a very small number of cases involving property will tend to conform to this X value formula.\textsuperscript{125} If this were not the case, then a much narrower range of remedies would be available to claimants in our common law, as they would need only an order for restitution to satisfy the wrong that has been done to them. Hence, the gain/loss hurdle faced by a corrective account of fiduciary duties is not unique to it, but is rather shared by much of the ‘private law as a coherent normative practice’\textsuperscript{126}. On one hand, if D commits a tort against C, for example, by hitting him, he likely gains nothing other than the satisfaction of having caused him harm. On the other hand, if in the fiduciary sphere D pursues an opportunity in breach of duty that C would not have pursued anyway, C loses nothing in terms of an actual transfer of value. On both accounts, there is no symmetrical transfer satisfying the X formula.

Is it possible that the X=X formula views Aristotle’s mention of gains and losses inaccurately? Indeed, the X=X formula can be otherwise expressed by the idea of material loss, which is calculated by

\textsuperscript{123} Stephen R. Perry indeed argues that corrective justice is impossible where the first X value does equal the second in “The Moral Foundations of Tort Law”, (1992) 77 Iowa L. Rev. 449.
\textsuperscript{124} Weinrib in “Gains and Losses” supra note 11 at 277 pinpoints Coleman and Perry.
\textsuperscript{125} Ibid at 278.
\textsuperscript{126} Ibid.
subtracting the amount owned before and after the wrong is committed towards the plaintiff.\textsuperscript{127}

Looking beyond material loss, there is also a normative loss to the principal, which is found in ‘the loss from the standpoint of the relevant norm’.\textsuperscript{128}

Professor Weinrib argues that normative loss reflects corrective justice’s true concern, based on Aristotle’s reference to suffering by the plaintiff as amounting to a loss.\textsuperscript{129} On this understanding, $X=X$ is a misunderstanding that seeks a precise mathematical connection that is insignificant. Instead, the focus should be on fulfilling on transferring ‘to the victim the amount representing the actor’s self-enrichment at the victim’s expense’.\textsuperscript{130} This underlines the idea that the expense mentioned need not be a loss of a certain amount equal to the self-enrichment derived from the conflicted transaction.

Liability must seek to compensate the wrong more broadly between the parties, not as a numerical reflection of what was lost, but as a conceptual reflection of what was suffered. When we say ‘loss’, what is really being referred to is a wrong that can in some way be made right through the imposition of a correlatively structured remedy to the parties, in order ‘to vindicate their equality’.\textsuperscript{131}

Part of the complexity here arises because this explanation is different from the way liability has historically been attributed in fiduciary liability. The fiduciary’s wrong has always been treated independently from the plaintiff’s right, because strict liability requires no connection to be made.

\begin{itemize}
\item[\textsuperscript{127}] Weinrib, \textit{Private Law supra} note 23 at 115.
\item[\textsuperscript{128}] \textit{ibid}.
\item[\textsuperscript{129}] Weinrib, “Gains and Losses” \textit{supra} note 11 at 278.
\item[\textsuperscript{130}] Weinrib, \textit{Private Law supra} note 23 at 63.
\item[\textsuperscript{131}] Weinrib, “Gains and Losses” \textit{supra} note 11 at 280.
\end{itemize}
Unlike corrective justice, it treats them as ‘mutually independent changes in the parties holdings’\textsuperscript{132}, because that is the most efficient way of apportioning liability according to deterrent approaches.

If we go back to Aristotle’s lines of equal length, as Weinrib explains them\textsuperscript{133}, then it must be that the lines cannot be understood by measuring the length of the segment transferred with a ruler and associating that measurement with the quantum of remedy that is appropriate, since it may be shorter at the defendant’s end and longer at the plaintiff’s or vice versa. Justice is done and the parties are made equal again, by re-attaching the segment wrongly transferred, but this must be done with reference to the correlative relationship between the parties themselves, rather than by simply looking at the size of the lines, which say little about what was actually gained and lost. Any more calculated account of gain and loss takes into account information that is ‘irrelevant, because corrective justice is concerned with the correlativity of normative, not material, gain and loss’\textsuperscript{134}.

In conclusion, Professor Weinrib’s suggestion that what matters normatively is the result of ‘more’ and ‘less’ to the parties, based on Aquinas’ interpretation of Aristotle’s work, should be carried through into this paper.\textsuperscript{135} More and less are not as misleading as gain and loss are because they more accurately reflect the complexity of the wrong between the parties as not necessarily reducible to gains and losses. This is especially important in the fiduciary sphere given the sophistication and number of remedies available to redress the harm committed, whatever results of loss or gain they may produce. Professor Weinrib opens the gates for a discussion of correlative fiduciary duties when he states that a

\textsuperscript{132} Weinrib, \textit{Private Law supra} note 23 at 63.
\textsuperscript{133} Weinrib, “Gains and Losses” \textit{supra} note 11 at 280-281
\textsuperscript{134} \textit{Ibid} at 286.
\textsuperscript{135} \textit{Ibid}.
‘wrong to the victim suffices for corrective justice in the absence of material gain by the wrongdoer’.\textsuperscript{136} This statement suggests conceptual compatibility with fiduciary law for two reasons. The first concerns the immateriality of material gain, which sometimes will not be present in breaches of fiduciary duties. The second concerns the importance of the wrong as a correlative manifestation of the link between the parties, a foundation on which correlative liability in fiduciary relationships can be built.

Liability is still perfectly capable of being viewed correlatively, because ‘the sufferer loses by virtue of the doer’s gain, and vice versa’.\textsuperscript{137} The justification for reestablishing equality between the parties is still starkly opposed to distributive justice, and the economic perspective of deterrence discussed above, because the parties are conceptually linked in the liability inquiry.\textsuperscript{138} Only the internal relationship is relevant in determining liability, and different methods of awarding damages complement rather than hinder the correlative upholding of justice in the bi-polar fiduciary relationship.\textsuperscript{139}

It was mentioned at the beginning that this paper would focus on the liability between the defendant and claimant, rather than the inception of the actual correlative relationship between them. The reason for this has just been made clear by the above. If material gain is not a vital part of the inquiry, and ‘the gains and losses in Aristotle’s text are nothing but quantitative representations of the doing and suffering of wrong’\textsuperscript{140}, then the conceptual demarcation between the relationship calcification and liability stages of the correlative justice account must be a slight one. Indeed, if liability is anchored,

\begin{thebibliography}{9}
\bibitem{136} Ibid at 288.
\bibitem{137} Ibid at 280.
\bibitem{138} Ibid at 281.
\bibitem{139} Ibid at 288.
\bibitem{140} Ibid at 289.
\end{thebibliography}
not in gain and loss at all, but in the existence of a wrong that is correlatively structured, then the two stages are conceptually unified. References to them as separate can be done only as a matter of convenience to limit the focus of the paper, but not as a normative standpoint that slices corrective justice into two. Doing so would be like arranging the stems of roses in a vase without an actual rose attached. In this paper we are looking at the stems, but that does not mean we have severed the flower.

**Private law relationships and fiduciary relationships**

One key point of contention to be addressed is whether the correlativity of private law can really be applied straightforwardly to fiduciary liability. The first chapter made clear that duty of loyalty rightfully belongs to the private law sphere, by virtue of the correlative duties and rights that exist between fiduciary and principal. However, this mainly focused on the duties and rights owed rather than the subsequent justification of certain forms of liability.

The overall difficulty that may conflict with corrective justice concerns the equitable remedies available in case of breach of the obligations owed by the fiduciary, because as Weinrib puts it, discussing both this area and unjust enrichment, ‘the possibility of gain without loss presents a well-known crux’ because the result for plaintiffs is often ‘restitution of what they never had and would not have received’.\(^{141}\) Therefore, a useful starting point to look to for traditional justifications surrounding fiduciary liability is James Edelman’s book *Gain based Damages*, where the chapter on equitable wrongs underlines many of the assumptions often made in imposing liability. Due to the myriad variations of breaches that may occur, some of which may not result in actual loss, there appears to be a fundamental difference between what happens in fiduciary liability and the idea stemming from

\(^{141}\) *Ibid* at 296.
Aristotle that ‘the plaintiff has lost what the defendant has gained’\textsuperscript{142}. The issue would be that equitable remedies arising from breach of duty are completely at odds with the segments of justice. Hence, for justice to be done by the judge, firstly, the loss segment must be equal to the gain segment resulting from the breach of duty and secondly, the judge must reestablish ‘the midpoint of the line’ in between the two disturbed equal parts.\textsuperscript{143}

The culprit responsible for the inconsistency between Aristotle’s original depiction of corrective justice and equitable remedies is strict liability, whereby the fiduciary must account for a greater segment than that lost by the principal. This example is most striking when you consider that the fiduciary can be liable even when no loss to the principal occurs, as in \textit{Boardman v Phipps}. Nonetheless, in the end ‘all that liability under corrective justice requires is that one person have wronged another’.\textsuperscript{144} This realization opens the conceptual path for correlative fiduciary liability.

\textbf{What if the breach produces a gain for the plaintiff?}

What happens where a breach of duty results in a profit for the fiduciary, which does not cause a quantifiable loss to the plaintiff? Trying to grapple with such issues brings to mind Kelsen’s critique of Aristotle’s theory, which argued that correlativity fails to address the quantum of liability to be attributed to the plaintiff in recognition of the wrong done to him.\textsuperscript{145} As Professor Weinrib puts it however, this complaint ignores the fact that correlativity is a formal structure rather than a substantive prescription.\textsuperscript{146} The result of this realization is that corrective justice is not a liability calculator, but

\textsuperscript{142} Weinrib, \textit{Private Law supra} note 23 at 63.
\textsuperscript{143} \textit{Ibid} at 65.
\textsuperscript{144} Weinrib, “Gains and Losses” \textit{supra} note 11 at 289.
\textsuperscript{145} \textit{What is Justice} (University of California Press, 1957) 125-136.
\textsuperscript{146} Weinrib, \textit{Private Law supra} note 23 at 66.
rather a means of structuring and a mode of ordering, and this in turn lets us focus on the process of fiduciary liability rather than the numerical product of it.

As long as a wrong, as opposed to a monetary loss occurs, then there really is a shortening of the principal’s segment disturbing the mid point in the form of a breach of the duty of loyalty legitimately expected from the fiduciary. In this we find both our right and our wrong, if we pay less attention to the amount lost, and more attention to the intangible yet still paramount loyalty that is lost between the parties.

**Deterrence revisited**

Much like morality has a different face within and without the fiduciary relationship, deterrence too makes an appearance in the application of correlativity to fiduciary liability. Indeed, it has been there all along, not as a goal determining liability, but as coercive force emanating from the process of transferring the segments of justice.\(^{147}\)

The presence of deterrence is attributed to the existence of a right ‘that every act of wrongdoing be answered by an equal and opposite reaction’.\(^{148}\) Hence, it is a natural attribute of correlative liability. It makes no appearance in the liability process between the parties, but is rather part and parcel with the idea of law as an ‘external force capable of determining the actor’s will’ as a deterrent to committing breaches of fiduciary duty here.\(^{149}\) Once liability occurs between a fiduciary and his principal in any particular instance, it gives notice to all others who undertake to act with complete loyalty of the consequences of breach that awaits them if they act similarly. This is a natural ramification for any effective system of law. It has demanded explication only by reason of the effectiveness it conveys and

\(^{147}\) *Ibid* at 108.


the contrast it exemplifies compared to the massively utilitarian deterrence used as a means of justifying and determining liability historically in the development of fiduciary law.
Chapter 3: The theoretical implications of corrective justice in fiduciary law

In putting the first and second chapters together, this chapter will try and conceptualize what a shift in our understanding of fiduciary relationships would look like. The hope so far is that corrective justice can serve to point out, and perhaps aim to heal, some of the deficiencies in fiduciary liability pointed out above. Aristotle’s early account of correlativity in the private law sphere made clear that justice being done in liability is a good thing, since it ‘is virtue practiced toward others’\(^\text{150}\). Hence, justice is not an internal characteristic, but is rather an external quality that should ideally be present when liability occurs in the fiduciary relationship.

To sum up our findings so far, liability in correlative fiduciary duties must be viewed as normative rather than material to be feasible. This is a positive development for fiduciary duties because it offers a previously unturned ground stone for the haphazard culture of liability that has taken hold. Looking at the remedy as a ‘due’\(^\text{151}\) rather than a singular transfer is enlightening and conceptually satisfying in a way that deterrence and morality tend not to be when externally formulated. Moreover, as was discussed at the end of the first chapter, external justificatory mixtures do not make a coherent internal structure. Professor Weinrib discussed that ‘any given relationship cannot rest on a combination of corrective and distributive justifications’, and the significance of this is that any cohesive application of corrective justice must reject other modes of ordering such as those discussed in chapter one.\(^\text{152}\)

Fiduciary obligations have done exactly this, but without explicitly admitting that the aim is to reach for either form of ordering. Perhaps this subliminal mixture in the minds of judges when determining

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\(^{150}\) Weinrib, “Corrective justice” \textit{supra} note 13 at 405.

\(^{151}\) Weinrib “Gains and Losses” \textit{supra} note 11 at 297.

\(^{152}\) Weinrib, “Corrective justice” \textit{supra} note 13 at 417-418.
liability is what has created such a conceptual mess in the first place, if ‘each necessarily undermines the justificatory force of the other’.\footnote{Ibid at 418.}

The above discussion has accomplished two main conclusions. The first is that there are many discrepancies and gaps in the justifications and normative foundations in fiduciary liability. The second has suggested that corrective justice may be a healthy friend for fiduciary duties to build a theoretical partnership with. However, although these two conclusions suggest that correlative fiduciary duties are feasible, they may be theoretically unsound. The foremost ground that threatens correlativity fiduciary liability concerns the conditions of correlativity. While previous chapters have determined that correlativity complements the features of fiduciary relationships and liability, we are now focusing on the flip side of the coin, which concerns whether fiduciary duties can ever meet the theory requirements of correlativity to an extent that these duties would then justify the concept of correlative fiduciary liability.

**The conditions of correlativity**

The conditions of correlativity are unity, bipolarity and equality.\footnote{Weinrib, *Private Law supra* note 23 at 120.} Because these elements are all inherent to correlativity, they have each been mentioned before. Now it is time to put fiduciary liability to the test by applying them. The possibility of unity in fiduciary liability was found in the idea of normative gains and losses over material ones, which conflict with the idea of liability as seamlessly correlative.\footnote{Ibid at 120.}

So long as the relationship between the parties is not forgotten in favor of external justifications, bipolarity is found inclusively in the duties owed and rights gained by virtue of the duty of loyalty.
Hence bipolarity expresses the necessity of focusing on liability between the parties at hand rather than prospectively through deterrence for the sake of deterrence. In this way deterrence as a justification is akin to compensation according to Professor Weinrib’s conception, because it relates the party to others at large, only instead of relating between plaintiff and others, deterrence relates between defendants and others.\textsuperscript{156}

Together, unity and bipolarity remind us that a corrective justice account of fiduciary liability can never focus on the wrong-doer or the wrong-sufferer alone when conceptualizing liability\textsuperscript{157}, in the same way that it does not make sense to look to one or the other when adjudicating liability. In complement equality expresses the need for a balancing quality to liability that is particularly critical given the imbalance that has developed in the fiduciary concept. In a fashion, equality is bipolarity augmented, in that it ensures that both parties have not only standing, but also equal standing.\textsuperscript{158} For fiduciary liability, this theoretical shift is nothing short of revolutionary, and as such, deserves further inquiry.

\textbf{Equality in liability}

To a corrective justice newcomer, the idea of equality in liability seems strange, and almost unbelievable, given the focus on one or the other of the parties in almost every area of law as traditionally perceived. Specifically, equality poses a challenge for the fiduciary focus on the possibility of conflict, given that this inquiry not only ignores the plaintiff completely, but also tends to ignore the defendant since liability is not based on actual conflicts.

\textsuperscript{156} Weinrib, \textit{Private Law supra} note 23 at 121.  
\textsuperscript{157} \textit{Ibid} at 120-121.  
\textsuperscript{158} \textit{Ibid} at 121-122.
The difference that is created by correlativeity’s features in the fiduciary concept has already been seen in previous chapters. For example, in order to meet the requirements of correlativeity, morality cannot be the driving force for liability merely because of the fiduciary’s behavior generally. Rather, correlativeity establishes ‘the moral nexus between a specific plaintiff and defendant.’ Moral duty without moral right is correlativey meaningless, and the same stands for liability. Equality is important from any angle that values justice, and this extends on a global scale, noticeable even in Aharon Barak’s conception of the role of a judge in a democracy.

Looking at corrective justice, what triggers liability to the plaintiff? Supporters of fiduciary’s deterrent roots would say that it is the possibility of a conflict that gives rise to an obligation to disgorge any profits or benefits acquired. Corrective justice however, views things more simply, by saying that ‘the wrongful interference with the right entails the duty to repair’. Moreover, in order for liability to occur, there must be a connection between defendant and plaintiff to the extent that the fiduciary’s enrichment must be at the principal’s expense to some extent, justifying liability in the form of an obligation to restitute the plaintiff accordingly. Hence we can say that at the starting point, irrespective of any characteristics of wealth or vulnerability that might pertain, conceptually ‘the parties are equals, and justice consists in vindicating their equality’ through correlative liability.

Hence, consistently with negligence, the correlative fiduciary concept forms ‘a single normative sequence that begins in the defendant’s action and ends in the plaintiff’s suffering’. The following

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159 *Ibid* at 125.
161 See for example, *Boardman v Phipps* in Chapter 4.
163 *Ibid* at 140-141.
164 Weinrib, “Gains and Losses” *supra* note 11 at 284.
section takes a further look at the conceptual meaning of this action and suffering when it comes to fiduciary loyalty.

**Property in Loyalty**

Viewing the loss to the plaintiff as a normative one unravels many challenges of the fiduciary relationship but not all of them. One issue that has been skirted so far is how to conceptualize the right of the principal with respect to the duty of loyalty. We concluded above that Aristotle’s conception allowed for an understanding of loyalty as a right belonging to the principal, but this leaves open many questions about the content and nature of this right. One way to view the right in the loyalty equation is to describe as a personal obligation. However, this causes conflict with the idea of fiduciary duty as rooted in the private law spheres of property and equity, because fiduciary duties historically have developed though viewing the fiduciary obligation as a possessory interest rather than a personal right. As Professor Weinrib has put it while framing fiduciary duties within the idea of private law, ‘existence of the fiduciary obligation means that the loyalty demanded by that obligation is included within the plaintiff’s possessions’.

166 Hence this conception of liability answers the dilemma by viewing the right of the principal as a proprietary one rooted in the same loyalty that is owed as a duty by the fiduciary.

Once a breach occurs, ‘the resulting profits can be thought of as the factual embodiment of the plaintiff’s right’. 167 The effects of loyalty as both a duty and a possessory interest will be more fully explored in chapter four, but until then, the realization that from a correlative standpoint, fiduciary duties can justify liability for breach of loyalty through a conception of loyalty as proprietary is in

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166 Weinrib, *Private Law* supra note 23 at 141.
accordance with our previous rejection of utilitarianism in fiduciary law. This is because, were it not for the principal’s right to loyalty from his fiduciary, and the duty to respect that right, correlativity would be impossible because fiduciary law would be adopting ‘as a principle the idea that wealth maximization legitimates the use of another’s property’. Hence, this development of the plaintiff’s right increases the correlativity between them and further explicates the need to reject other modes of ordering that would irreparably disrupt the balance of rights and duties between the parties.

**Strict liability**

Chapter one made clear that deterrence, morality and strict liability are all players that have exercised dominant roles in the development of fiduciary liability. While the former two have already been dealt with, strict liability has been saved for this chapter for two reasons. Equality was discussed above as the paramount consideration that prohibits surrender to strict liability in corrective justice like that of fiduciary law. Equality must result in a decision to ‘exclude strict liability’ despite any setbacks it may cause to the feasibility of correlative fiduciary liability in chapter four.

The character of strict liability for fiduciaries is best reflected by Professor Weinrib’s quote that under it the plaintiff’s property is a ‘sacrosanct domain of autonomy, within which the plaintiff is entitled to freedom from interference by anyone else’. However, as was mentioned above, fiduciary liability differs eccentrically because the freedom from interference does not extend to everyone, but rather only to the fiduciary, whose actions become triggers for liability. Professor Weinrib sees strict liability as creating liability for mere actions that create effects ‘regardless of culpability’.

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169 *Ibid* at 177.
170 *Ibid* at 179.
171 *Ibid* at 181.
and effects that create strict liability for fiduciaries? Strict liability labels an approach that ‘is more concerned to penalize the fiduciary for having taken up an opportunity…than to ascertain whether or not there has been a conflict’.\(^{172}\)

The second reason is that unlike unity and bipolarity, strict liability cannot be viewed in different ways depending on whether it acts externally or internally over the bipolar relationship between fiduciary and principal, and so it is incapable of reform. In a nutshell, strict liability is conceptually problematic in our account of correlative fiduciary liability because it comes into play unquestioningly upon the possibility of conflict, regardless of a loss or harm being found. Strict liability traditionally operates as the mousetrap-like cage that falls on the fiduciary as soon as he claims the cheese for himself. Whether he did so innocently does not come into play.\(^{173}\)

Having made the case contrasting strict liability and correlativity, it is now important not to fall into extremes. Moving from a strict standard of liability to a subjective one is not the aim, because ‘under the subjective standard the positions are reversed’, given that the fiduciary would then only have to point to some personal defect to avoid liability.\(^{174}\) Each approach to liability is as unequal as the other.\(^{175}\) In correlative fiduciary liability, there cannot be a normative harm without some fault, and this realization prohibits retaining both a possibility of conflict approach and strict liability.\(^{176}\)

**Envisioning the conceptual outlines of correlative fiduciary duties**

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\(^{172}\) Parker and Mellows *supra* note 37 at 364.

\(^{173}\) Again, see *Boardman v Phipps* in Chapter one and four for an example of such faultless behavior.


\(^{175}\) *Ibid* at 178.

\(^{176}\) As is the case in tort liability, *ibid* at 203.
The above has made clear that embarking on a correlative path with fiduciary obligations is by and large synonymous with increasing the conceptual coherence of this legal relationship. As such, coherence is one of the key theoretical implications this section returns to again. Coherence is an important implication because of its inseparable relationship with justification, which was mentioned above as one of the great lacunas in the liability inquiry. The case law discussed in the following chapter will further highlight the importance of coherence and justification in practice. Prior to this however, it suffices to say that these are apposite to the normative flaws pinpointed concerning fiduciary liability above. If the result of the first chapter has been to emphasize the arbitrariness of fiduciary liability through the muddled inquiry that routinely takes place, then it can be said to fit Professor Weinrib’s description as ‘an incoherent private law relationship’. If correlative fiduciary relationships can succeed without stumbling by virtue of the remedies associated with liability, as the above discussion suggests it can, then it possesses the normative ability to break free of this description.

177 ibid at 39.
Chapter 4: The judicial benefits of corrective justice in fiduciary law

This chapter will elucidate what is ultimately meant by correlative fiduciary liability by examining the effect of corrective justice on several key cases. That said, this chapter will focus on the operation of corrective justice principles, rather than proposing to reassess judgments made on the facts so as not to ‘pass in review the myriad of judgments’ available. 178 Again, correspondingly to the 1975 article by Professor Weinrib, the cases in this chapter were chosen for their varying approaches. 179 This is to be compared with the justifications that would occur in a correlative fiduciary relationship, where liability imposed by courts would be correlatively structured. So long as fiduciary law lacks a certain amount of self-awareness and understanding, the task of applying a correlative approach between the parties will necessarily also be somewhat tentative.

Applying correlative liability to fiduciary liability

Now that the meaning of gain and loss according to Aristotle’s corrective justice has been demystified in the previous chapter by applying Professor Weinrib’s interpretation to fiduciary duties, what does correlative liability look like? Professor Weinrib completed this same inquiry for tort law instead of fiduciary obligations in his paper on gains and losses. 180

Beginning with a relationship that already ranks as fiduciary, the first aspect is to determine whether the principal’s injury is committed against something that ranks as a right, since the principal cannot recover from a mere material loss without a concordant right. Although the right of the principal is less obvious than the right not to be physically injured, or the right to have a contract performed, it is no

178 Weinrib “Fiduciary” supra note 1 at 3.
179 Ibid.
180 Weinrib “Gains and Losses” supra note 11 at 294.
less concrete, as was made clear by *Keech v Sandford*. In that case, we saw liability occur on the basis that the fiduciary had taken on a lease for himself after the principal failed to do so successfully. The trustee was held liable and it was said that he held the property on constructive trust. Looking at this case through a correlative lens shows us that the right correlative to the duty is to be found in the obligation of loyalty to the infant principal. Although the principal had no right to prevent any ordinary person from acquiring the lease, he acquired the right to expect no conflicts to arise from his relationship with his trustee, thereby ensuring that ‘the trustee is the only person of all mankind who might not have the lease’. 181 Contrasting with Lord King’s approach however, correlative fiduciary liability would not base a finding of liability on the risk of the fiduciary forsaking his conscience generally, but rather on the idea that the principal’s ‘entitlement to loyalty’ 182 has been breached, which is a normative loss independent of the fact that the lease would not materially have been given to the principal anyway.

The second aspect concerns the identification of the wrong committed by the defendant against the right in step one. While the compatibility between corrective justice and strict liability has been mentioned and doubted above, it is now time to face the issue head on. The possibility of conflict approach is problematic because it imposes liability without a full examination of the conflicted transaction. Conversely, corrective justice requires there to be an inquiry because ‘suffering by the plaintiff that does not result from the defendant’s action has no significance’. 183 For there to be a wrong, we cannot merely identify a possibility of conflict, but rather an actual conflict must be located. We have already identified *Boardman v Phipps* as such a case in earlier chapters.

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181 Lord King at 175.
182 Weinrib “Gains and Losses” *supra* note 11 at 296.
Looking to the defendant solicitor, he supplied evidence that he acted in the best interests of the principals, attempted to obtain consent, ensured that the trust could not buy the property, suffered risk himself with his partner, and made sure that the only way to increase value would be to go through with the purchase personally.\footnote{Lord Upjohn noted that there never was any suggestion that the beneficiaries would have even contemplated the purchase of the shares, \textit{Boardman} at 120.} Indeed many have commented that the conflict of interest in \textit{Boardman} was in reality more illusion than fact.\footnote{For example, Jones (1968) 84 L.Q.R 472.} More importantly for the purposes of correlative fiduciary liability, it was not only an illusion in terms of a material wrong occurring, but also a normative one.

Despite the majority ruling in favor of liability, Lord Upjohn dissented on the basis that the phrase ‘possibly may conflict’ requires consideration.\footnote{\textit{Boardman}, Lord Upjohn at 124.} He argued that conversely to traditional fiduciary approaches, liability should be triggered when ‘the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict’, rather than accepting that there could be a ‘conceivable possibility’ of conflict in some unknown scenario.\footnote{\textit{Boardman}, Lord Upjohn at 124.} Correlatively speaking, we know that equality requires much more attention to the parties than the majority devoted, because such a possibility of conflict approach is partnered with strict liability. It triggers and falls without inquiry, and by doing so it risks creating liability where no harm occurred, which is exactly what happened in \textit{Boardman}.

The third aspect is where the nexus of right and wrong must occur. The third step is more complex than it seems however, and has often been ignored. For this reason, Weinrib’s characterization of it deserves
reproduction and discussion: ‘the duty breached by the defendant must be with respect to the embodiment of the right whose infringement is the ground of the plaintiff’s cause of action’\textsuperscript{188}

Hence the upshot of corrective justice is that liability only occurs if there is a symmetrical nexus where the breach of duty and right coincide like puzzle-pieces. The breach of fiduciary duty must be with respect to the right that the plaintiff sues to protect.

\textbf{Unraveling knots in Canada’s fiduciary liability case law}

In Canada, the fiduciary relationship has expanded in scope beyond recognition. The propensity for proliferation possessed by fiduciary liability is evidenced by Professor Weinrib’s assertion that it has subjected many roles ‘to its colonizing sway’.\textsuperscript{189} Both as a result of controversy and because of importance in fiduciary academic discussion, fiduciary obligations in the context of diverted commercial opportunities will form the focus, having begun above with \textit{Keech} and \textit{Boardman}, and now continuing by concentrating in particular on more recent Canadian decisions like \textit{Cropper}, \textit{O’Malley} and \textit{Strother}.

\textit{Cropper}

\textit{Peso Silver Mines v Cropper} is an interesting case to apply correlativity to because it is extremely controversial, given the different approach that was subsequently taken by the court in \textit{O’Malley}. It also forms a stark contrast to the approach that the House of Lords took in \textit{Boardman} above. \textit{Cropper} concerned the director of a mineral claims company, where the board was offered speculative claims in

\textsuperscript{188} Weinrib, “Gains and Losses” \textit{supra} note 11 at 295.
\textsuperscript{189} Weinrib “Fiduciary” \textit{supra} note 1 at 1.
the Yukon, which were rejected. Cropper himself as a director was present at this meeting and voted in favor of rejecting the offer, fortuitously, the owners of the claims subsequently offered to sell them directly to him, eventually resulting in an action against him for breach of fiduciary duty, on the basis that he acquired information about the mineral claims in his capacity as director of Peso, and breached his duty by using that information to profit.\textsuperscript{190}

The court ruled for Cropper, who was found not to have breached his duties. The key part of the case considered that information used for gain from must have been obtained in the course of the fiduciary’s duties, or else there can be no conflict.\textsuperscript{191} It was pivotal that Cropper had acted in the company’s best interests when he served on the board prior to leaving, and that his service had not afforded him any advantage that was subsequently exploited. By acting in this way, he managed to discharge his duties without activating any of the rights or breaching any of the duties inherent in his fiduciary position with respect to the company. This case highlighted a limit on the principal’s possessory interest in his fiduciary’s loyalty, as well as the correlative operation of fault as a necessary element of liability. Liability will only arise between the parties if the information is acquired as a result of, or in the course of, the fiduciary relationship. If it is not, then we can say that the company may have been materially harmed, but there was no normative breach of duty giving rise to liability.\textsuperscript{192} The same flexible approach had previously been discussed in \textit{Holder v Holder} in England, where the fact that no advantage was secured by virtue of the fiduciary role and knowledge was salient in that case, although it did not subsequently gain favor in others.\textsuperscript{193} Property rights are not absolute, and the maintaining of equality between the parties requires there to be a limit on the right correlating with the duty. If this

\textsuperscript{190} \textit{Cropper} at 683 per Justice Cartwright.
\textsuperscript{191} \textit{Cropper} at 682.
\textsuperscript{192} Weinrib, “Gains and Losses” \textit{supra} note 11 at 283.
\textsuperscript{193} [1968] Ch. 353 at at 367.
were not so, fiduciaries would be undertaking to act in the sole interest of principals ad infinitum, and such a view is against not only the equality aspect of correlativeity, but also the idea that fiduciary duties operate within a coherent system of private law. Such a mode of ordering must not allow for infinite liability, because this result would threaten the very coherence it aims for.\(^{194}\)

\textit{O’Malley}

\textit{Canadian Aero Service Ltd v O’Malley}\(^{195}\) is often described as the leading case on corporate fiduciary duties in Canada.\(^{196}\) According to the court itself, the liability found in the case reflects ‘the pervasiveness of a strict ethic in this area of the law’, which is necessary ‘in the public interest’ as a backbone for statutory regulation and accountability.\(^{197}\) The Supreme Court of Canada attempted to distinguish this case from \textit{Cropper} on the basis that there was a breach of fiduciary duty on the facts that survived the directors’ resignation. The directors had left the corporation while negotiations for a contract were in play, and then subsequently acquired that same contract for themselves. Correlatively speaking, we clearly see a duty to act loyally to the company that they originally acted for, given their inherent fiduciary duties as members of the board, and a correlative right in that loyalty not to profit from opportunities presented to the board without permission. Moreover, \textit{O’Malley} exhibited the key element of fault that was missing from \textit{Cropper}, where the board has previously rejected the offer, a fact that was not present in \textit{O’Malley}. The right and the wrong are clear, and tie the parties together, giving rise to an obligation to disgorge the profits made by virtue of the opportunity.

\(^{194}\) Professor Weinrib discusses coherence as something to strive for in \textit{Private Law supra} note 23, and the same should hold true in practice if correlative fiduciary is to translate into real liability adjudication.


\(^{196}\) Waters’, \textit{Law of Trusts supra} note 9 at 466.

\(^{197}\) \textit{O’Malley} at 381-382 and 384.
However, strictly speaking, this is not why the court ruled in favor of liability. The court placed emphasis on the fact that in *Cropper*, the claims could not be held to be essential to the future of the company, and various opportunities were presented in *Cropper*, as opposed to the negotiated opportunity here. Conversely, a correlative approach would have stressed that a claim of ‘merely material loss of being made worse off or of being deprived of a prospective advantage’ is not sufficient to import liability.\(^{198}\)

Moreover, Laskin J listed a panoply of factors as determinative of when liability should occur, although these were not ordered into anything resembling a sequenced argument capable of coherent application. These factors included the position or office held by the defendant; the ripeness of the opportunity and its nature; its specificity; the amount of knowledge the fiduciary possessed; the circumstances in which the information was obtained; the privacy of the information; and finally the factor of time in the continuation of the duty.\(^{199}\) These factors muddle the fiduciary inquiry into previously unseen incoherence, because it creates an unpredictable sliding scale of liability that is akin to passing a driving test. Pass enough factors and you may be safe from conflict, but trigger enough of them, even if they do not connect, and you will fail and have to redress a wrong that you did not correlative commit with respect to the plaintiff, through the absence of at least one of the aspects discussed at the beginning of this chapter.

\(^{198}\) Weinrib, “Gains and Losses” *supra* note 11 at 294.

\(^{199}\) *Canaero* per Laskin J at 606.
The *O’Malley* case brings to mind Jane Stapleton’s work in tort law, which examined a swathe of cases and in doing so, identified over fifty policy concerns prevailing in tort law cases. Laskin J’s factors are presented as factors relevant to the relationship between the parties, but in reality they are sawdust from a structure of liability that is never considered, and are not applied correlatively at all. Indeed, Oosterhoff has commented that it is odd that Laskin implies that the fiduciary duty continues after a director resigns if the resignation is prompted by a desire to intercept a corporate opportunity. Such an approach is impossible to reconcile with a desire for any amount of coherence in fiduciary liability.

**Learning from Corrective justice**

*Strother* illustrates the importance of correlative fiduciary liability’s rejection of externally imposed goals such as deterrence. *Strother* held that an account of profits could be awarded for either unjust enrichment or deterrence reasons and that, where the purpose is deterrence, the plaintiff's loss does not matter. Therefore, although considerably equivocal in its justifications, the court in *Strother* appeared to be in favor of the use of gains-based remedies solely for deterrence purposes and without reference to some conflict or wrong occurring. It is in these kinds of inquiries where the circle of justice encompassing correlative liability and subsequent deterrence would make its mark. Had correlative fiduciary liability been considered in *Strother*, deterrence would not have had a part in determining ‘the nature of the wrong’ done to the plaintiff, nor the correlative liability that the wrong imports. However, because the circle of justice is situated in the realm of positive law, deterrence ‘minimizes

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201 *v. 3464920 Canada Inc* [2007] 2 S.C.R. 177.
202 Duggan, *supra* note 12 at 3.
203 Weinrib, “Deterrence” *supra* note 60 at 638.
the problem of injustice”\textsuperscript{204} that cases like \textit{Strother} try to address. However, subsequent deterrence within the circle of justice does not distract from the process of adjudicating liability between the parties as it did in \textit{Strother}, and \textit{Keech} before it.

Corrective justice will always look for the right and wrong, and the corresponding normative gain and harm that occurred on the facts. What is the effect of corrective justice on liability? Going back to an original Aristotelian view, the culmination of correlativity ought to be an elimination of ‘wrongful gains and their correlative losses’.\textsuperscript{205} The correlativity of the gain and loss reflects and partners congruently with the correlative relationship between the parties. The upshot of applying correlative liability to the fiduciary cases above has been the assuaging of any doubts surrounding the loss of the dispensable elements discussed in chapter one from the fiduciary relationship, leaving us with a considerably streamlined and conceptually coherent correlative fiduciary relationship.

\textsuperscript{204} \textit{Ibid} at 639.
\textsuperscript{205} Weinrib, “Gains and Losses” \textit{supra} note 11 at 277.
Conclusion

My hypothesis has been grounded in the conviction that the characteristics that make fiduciary relationships enduring, important and unique are also germane to corrective justice. In other words, the latter can enliven the former because they are legal soul mates, each focused on the relationship between the parties. Because ‘Aristotle’s idea of corrective justice is indispensable to understanding private law as a coherent normative practice’, this allows an understanding of fiduciary liability as an equally coherent normative practice.\(^\text{206}\) The aim has not been to force one into a perfect mirror image of the other in the thesis, but to think about the ways in which corrective justice can positively influence fiduciary obligations to be clearer and more predictable. Are correlative fiduciary duties examples of fairness and coherence, as they should be if they truly conform to the values of corrective justice?\(^\text{207}\) This paper has sought to show that they are indeed, and that there is real value in pursuing correlative fiduciary duties, if only because such a conceptual exercise promises to endow this unique legal relationship with the coherence and justification that has so far eluded it, by applying a single justification\(^\text{208}\) rather than a mingling of factors or independent goals.

In the first chapter correlativity was pronounced as a birthright for fiduciary liability, a heritage common to the family of private law it belongs to. The path to imagining the effect of this inheritance has not been a straightforward one in this thesis, but rather has sometimes been characterized by difficulties concerning the anchored external justifications that have often exercised control so far. However, realizations such as the internality of morality and the subsequence of deterrence, both part

\(^{206}\) *Ibid* at 278.

\(^{207}\) *Weinrib*, “Deterrence” *supra* note 60 at 624.

\(^{208}\) As Professor *Weinrib* puts it, ‘by requiring a single justification to apply correlative to both litigants, corrective justice shows how private law can be a coherent normative phenomenon’ in “Gains and Losses” *supra* note 11 at 297.
of a greater and more effective process that has been described as a circle of justice, make correlative fiduciary duties feasible. Conceptually at least, the exercise has been worthwhile. We have remembered the benefits of a coherent approach, unencumbered with independent goal. We have seen the simplicity and clarity of looking only to the fiduciary and principal in determining liability. New meaning has been highlighted in the title of fiduciary relationship. Corrective justice and fiduciary relationships are titles containing a potency of language that is seldom thought of. Justice, equality, unity and fairness are but a few of the features of private law that endow it with the justification necessary to claim the tenor of being law, both conceptually and practically, as an idea of reason. Private law forms the parent under whom fiduciary relationships flourish, and since the apple never falls far from the tree, corrective justice has served to render to fiduciary relationships the fruits of its rightful endowment in this paper.
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