Fusion or Confusion? But-For Causation in Fiduciary Law in *Stirrett v. Cheema*

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PART I INTRODUCTION

Two Supreme Court of Canada decisions in the early 1990s—*Canson v. Boughton*[3] and *Hodgkinson v. Simms*[4]—provided that common law concepts could be considered in the determination of claims in equity, such as for breach of fiduciary duty. In the 30 years since, however, related questions have remained unanswered. When, and to what extent, should concepts borrowed from negligence law limit the right to equitable remedies? More specifically, what is the role of causation in a claim for breach of fiduciary duty?

With its May 2020 decision in *Stirrett v. Cheema*,[5] the Ontario Court of Appeal sought to answer the latter question. The Court held—for the first time in Canada—that a plaintiff must prove factual or "but for" causation to establish liability for breach of fiduciary duty.

To be sure, causation principles had been considered in earlier fiduciary duty jurisprudence. But *Stirrett* was notable for two reasons. First, *Canson* and *Hodgkinson* had referred loosely to a "link" between a breach of fiduciary duty and a plaintiff's loss, without determining the nature of such a link. *Stirrett* establishes that the requisite link is "but for" causation, just as in negligence law. Second, the Court in *Stirrett* found that factual causation must be established for the plaintiff to have a *right* to a remedy, whereas, to the extent causation was considered in previous fiduciary duty cases, it was invariably in the context of

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3 *Canson Enterprises Ltd v. Boughton & Co.*, [1991] 3 S.C.R. 534.

4 *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.

5 *Stirrett v. Cheema*, 2020 ONCA 288 [CA Reasons], reversing 2018 ONSC 2595, leave to appeal refused *Karen Stirrett v. Bradley Strauss*, 2020 CarswellOnt 17343 (S.C.C.) [Trial Reasons].

assessing or quantifying the remedy available, after liability for breach of fiduciary duty had already been established.

The Court of Appeal appears to have harmonized the tests for causation between negligence law and fiduciary law. Many may view this as an incremental step in the "fusion" of the common law and equity that began when the distinct courts of equity were merged with the common law courts well over a century ago.

While such fusion may to a certain extent promote certainty in the law, the authors suggest that the reasons in *Stirrett* also introduce some confusion by holding that a plaintiff must prove cause in fact to be entitled to a remedy, that is, in the *liability* phase of the analysis. Such a holding aligns with negligence law, and may have resulted from the fact that the only remedy sought by the plaintiff in *Stirrett* was equitable compensation, which is akin to common law damages.

But this holding is inconsistent with other fiduciary duty cases in which other equitable remedies have been sought. For instance, in *Strother*, in which an accounting of profits was awarded, the Supreme Court of Canada accepted that causation between the breach of fiduciary duty and any loss suffered by a plaintiff was *irrelevant*, and held that equity calls for the imposition of a remedy for breach of fiduciary duty "even where the beneficiary has suffered *no loss* because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship".[6] More recently, in *Williams Lake*, the Supreme Court of Canada held that in breach of fiduciary duty cases, causation must be addressed "under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established",[7] and added: "A breach of fiduciary obligation can be found even where the beneficiary has not proven that the breach resulted in a compensable loss, or has not suffered any loss at all".[8]

This apparent inconsistency may be reconciled, however, if the Court of Appeal's reasons are understood in (and limited to) the context in which they are written, *i.e.* where compensation was the only equitable remedy available on the facts, and where the stage of the analysis in which causation was applied was in all likelihood immaterial to the outcome of the case.

On a close reading, it appears the Court's intention was to ensure that an equitable remedy cannot be awarded absent a connection between the fiduciary breach and the remedy sought. In the context of equitable compensation, this analysis may indeed be analogous to a negligence case. But in the context of an accounting of profits, the question may be: but for the breach of fiduciary duty,

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6 *Strother v. 3464929 Canada Inc.*, 2007 SCC 24 [*Strother*] at para. 77 [emphasis added].
7 *Williams Lake* at para. 48.
8 *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 49.

would the *fiduciary* have obtained a benefit—without regard to any loss suffered by the plaintiff at all.

In any event, the authors further suggest that while greater certainty in the law may have been achieved, this comes at the expense of the flexibility that lies at the heart of equity in order to meet the requirements of fairness and justice in certain situations. The Supreme Court of Canada has been clear that fiduciary law serves distinct policy objectives than negligence law, and that when there are different policy objectives equity may engage in its well-known flexibility to achieve a different and fairer result than would be reached in the common law. Regrettably, it now appears that where the plaintiff cannot prove that she suffered a loss she would not have suffered but for the breach of fiduciary duty, and where other equitable remedies such as disgorgement are unavailable on the facts, it is possible to establish that a breach of fiduciary duty has occurred for which no remedy is available.

This article proceeds as follows. Part II summarizes the unsettled debate from the *Canson* and *Hodgkinson* cases on the role of common law principles in equitable claims, and the jurisprudence in the 30 years since. Part III discusses the distinct policy considerations underlying equity and the common law, which ought to be manifested in the analytical requirements for establishing a cause of action under each heading. Part IV reviews the facts, trial decision, and Court of Appeal decision in *Stirrett*. Part V examines the implications of the Court of Appeal's decision in *Stirrett*, and proposes a reading of the decision that will permit the important policy goals underlying equity to be honoured and reaffirmed in the future.

PART II THE UNSETTLED DEBATE IN CANSON AND HODGKINSON: CONFLICTING APPROACHES FOR CONSIDERING COMMON-LAW PRINCIPLES IN EQUITABLE CLAIMS

In two decisions of the early 1990s, *Canson v. Boughton*[9] and *Hodgkinson v. Simms*,[10] the causal connection between a breach of fiduciary duty and a plaintiff's claimed losses was put squarely before the Supreme Court of Canada. In multiple sets of reasons in each case, the justices of our highest court articulated disparate approaches to if, and how, equitable claims ought to be constrained by the common law. These cases frame the jurisprudential debate around the role of common law principles in adjudicating a claim in equity, which has, for decades, remained unresolved.

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[9] *Canson Enterprises Ltd v. Boughton & Co.*, 1991 CarswellBC 269, [1991] 3 S.C.R. 534 [*Canson*, cited to CarswellBC].

[10] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84 [*Hodgkinson*, cited to SCJ].

1. *Canson*

Canson v. Boughton concerned a lawyer who had breached his fiduciary duty to his clients, the purchasers in a real estate transaction, by failing to disclose a secret profit of $115,000, which had been paid to a third party in a "flip". The lawyer acted on the flip as well as the purchase, and concealed the secret profit from the purchasers. It was agreed that the purchasers would not have purchased the property had they known about the flip.[11]

The purchasers were later awarded nearly $5,000,000 in damages against engineers for negligently causing extensive property damage while developing a warehouse on the property in question. The engineers were unable to pay, and the purchasers commenced a new action in fiduciary duty against the lawyer, seeking compensation both for the secret profit the lawyer obtained and the losses caused by the negligence of the engineers.[12]

There was no dispute that by enabling and concealing the secret profit the lawyer had breached his fiduciary duty—the issue was the damages that were properly recoverable from the lawyer. All eight justices agreed in the result that the lawyer was liable for the amount of the secret profit, but ought not be held liable for the construction losses caused by the engineers' negligence. They were divided, however, on whether and how equitable compensation ought to be limited through the application of common law principles such as causation, foreseeability, and remoteness.

Writing for a plurality of four justices, LaForest J. held that it would be "inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results".[13] He reasoned:

> . . . in this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively underdeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment. Where 'the measure of duty is the same', the same rule should apply".[14]

Justice LaForest recognized that "Where a situation requires different policy objectives, then the remedy may be found in the system that appears more appropriate. This will often be equity".[15] But in the context before him, LaForest J. concluded that equitable remedies should be determined by reference to tort and contract principles, and that in "calculating

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[11] *Canson* at para. 3.
[12] *Ibid.* at paras. 4-6.
[13] *Ibid.* at para. 56 *per* LaForest J (Sopinka, Gonthier, and Cory JJ. concurring).
[14] *Ibid.* at para. 53 per LaForest J.
[15] *Ibid.* at paras. 52-56 per LaForest J.

compensation" a court should "ascertain the loss resulting from the breach of the particular duty".[16]

Writing for three justices, McLachlin J. (as she then was), disagreed with Justice LaForest's analysis, noting that "The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract".[17] She rejected the suggestion that damages for breach of fiduciary duty should be measured by analogy to tort and contract, in large part because fiduciary obligations engage different policy objectives than negligence and contract law. McLachlin J. outlined the unique foundation and goals of equity and held that "These differences suggest that we cannot simply assume that an analogy with tort law is appropriate . . . the better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy".[18]

Drawing an analogy to restoration *in specie*, McLachlin J. held that "equitable compensation must be limited to the loss flowing from the trustee's acts *in relation to the interest he undertook to protect*",[19] but emphasized that this "does not negate the fact that 'causality' in the legal sense as limited by foreseeability at the time of breach *does not apply in equity*".[20] Without elaborating on its nature, McLachlin J. endorsed "[t]he need for a *link* between the equitable breach and the loss for which compensation is awarded" as "fair and sound in policy".[21] On the facts of *Canson*, McLachlin J. concurred with Justice LaForest, stating: "The construction loss was caused by third parties [the engineers]. There is no link between the breach of fiduciary duty [by the lawyer] and this loss".[22]

Writing separate concurring reasons, Stevenson J. similarly rejected Justice LaForest's suggestion that the measure of damages in a claim for equitable compensation is the same as in negligence, and stated: "I would not define compensation in equity as merely putting the plaintiff in as good a position as the plaintiff was before the breach".[23]

2. *Hodgkinson*

Three years after *Canson*, the Supreme Court of Canada revisited the question of the existence and extent of a nexus between common law and equitable principles in assessing damages flowing from a breach of fiduciary

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16 *Ibid.* at para. 41, 51-53 per LaForest J.
17 *Ibid.* at para. 61 per McLachlin J.
18 *Ibid.* at para. 65 per McLachlin J.
19 *Ibid.* at para. 76 per McLachlin J [emphasis added].
20 *Ibid.* at para. 78 per McLachlin J. [emphasis added].
21 *Ibid.* at para. 77 per McLachlin J. [emphasis added].
22 *Ibid.* at para. 86 per McLachlin J.
23 *Ibid.* at paras. 91-92 per Stevenson J.

duty. In *Hodgkinson v. Simms*, the defendant financial advisor had induced the plaintiff to invest in tax-sheltered real-estate investment projects in which the defendant secretly had a personal financial interest (he also acted for the developer and would get larger fees in exchange for more sales). When there was later a sharp decline in the market, the plaintiff lost virtually all his investment. The plaintiff commenced an action for breach of fiduciary duty after he learned of the defendant's secret personal interest in the investments he had recommended.

Writing for the majority,[24] LaForest J. held that the defendant had breached a fiduciary duty owed to the plaintiff,[25] and that the plaintiff was accordingly "entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction".[26]

Justice LaForest expressly rejected the submission that the plaintiff was not entitled to such an award because he would have invested in another real-estate tax shelter had he known of the defendant's interest, in which case he would have been equally vulnerable to the market downturn. He held that this submission "runs up against the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach".[27] The majority concluded that "it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this loss in full".[28]

LaForest J. added that this result was not affected by the *ratio* in *Canson*, stating:

> *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a

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[24] Justices Sopinka and McLachlin authored dissenting reasons in *Hodgkinson*, but these reasons were primarily concerned with their conclusion that no fiduciary obligation arose in the circumstances. They did not return to the discussion of the role of common law principles in the measure of equitable relief from *Canson*; their reasons on damages were limited to damages for breach of contract, which was in their view the only basis for liability.

[25] *Hodgkinson* at para. 70.

[26] *Ibid.* at para. 73.

[27] *Ibid.* at para. 74 [emphasis added], citing *London Loan & Savings Co. v. Brickenden*, [1934] 2 W.W.R. 545 (Jud. Com. of Privy Coun.) at 550-551; see also *Huff v. Price*, *supra*, at 319-20; *Commerce Capital Trust Co. v. Berk* (1989), 57 D.L.R. (4th) 759 (Ont. C.A.) at 763-764, additional reasons 1989 CarswellOnt 1426 (C.A.).

[28] *Hodgkinson* at para. 79.

> fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate.[29]

Put otherwise, *Hodgkinson v. Simms* affirmed that a court exercising equitable jurisdiction *is not precluded* from considering common law principles where necessary to reach a just and fair result—but it is not *required* to consider common law principles either. This conclusion broadly aligns with the flexibility with which equity has historically been imbued to reach its underlying goals.

3. Additional Jurisprudence Concerning Causation in Fiduciary Duty Claims

Although *Canson* and *Hodgkinson* remain the only Supreme Court of Canada cases to consider the issue directly, important guidance on the role of causation in claims for breach of fiduciary duty may be found in other case law, both before and after these decisions.

In the 1974 Supreme Court of Canada decision *Canadian Aero Service Ltd. v. O'Malley*, directors and officers of the plaintiff company ("Canaero") were held to have breached their fiduciary duties for wrongly taking the benefit of a corporate opportunity for themselves. The trial judge fixed Canaero's damages at $125,000, representing the value of the misappropriated contract. On appeal, the directors argued that Canaero was not entitled to an award of such damages because the trial judge had also found as a fact that Canaero "could not have obtained the contract itself" even if the directors had not misappropriated the opportunity.[30] Put another way, the fiduciaries argued that because it had not been established that "the defendant's wrong was the cause in fact of some injury or loss", Canaero should not recover.[31]

Chief Justice Laskin squarely rejected the breaching fiduciaries' argument in *Canaero*, holding:

> Liability of O'Malley and Zarzycki for breach of fiduciary duty ***does not depend on proof by Canaero that, but for their intervention, it would have obtained the Guyana contract***; nor is it a condition of recovery of damages that Canaero establish what its profit would have been or what it has lost by failing to realize the corporate opportunity in question. ***It is entitled to compel the faithless fiduciaries to answer for their default*** . . .[32]

Canaero provided that it is a fiduciary's breach of duty that creates liability—and suggests that this liability will not be limited by "but for" causation. This is consistent with the foundational case of *Keech v. Sandford*,[33]

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[29] *Ibid.* at para. 80.
[30] *Canadian Aero Service Ltd v. O'Malley*, [1974] S.C.R. 592 at para. 50 [*Canaero*].
[31] See CA Reasons at para. 76.
[32] *CanAero* at para. 50 [emphasis added].
[33] *Keech v. Sandford*, [1726] EWHC Ch. J76, 25 E.R. 223 (Eng. Ch. Div.).

from 1726, which provides that fiduciary law does not require proof of wrongdoing to found liability, but only the mere *potential* for wrongdoing as a result of a breach of fiduciary duty.

Notably, in *Canaero* the remedy sought was an accounting of profits—not equitable compensation. While *Canaero* was cited with approval by both Justices LaForest and McLachlin in *Canson* on other related points, neither addressed its explicit rejection of "but for" causation in a claim for breach of fiduciary duty.

More recent jurisprudence from the Supreme Court of Canada has reaffirmed the principle Chief Justice Laskin confirmed in *Canaero*: a claim for breach of fiduciary duty may succeed even when it is found that the plaintiff did not suffer a loss. In *Strother*, another accounting of profits case, from 2007, the Court unanimously accepted that equity calls for the imposition of a remedy for breach of fiduciary duty "*even where the beneficiary has suffered no loss* because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship".[34] The Court held that equitable remedies may be awarded not only for restitutionary purposes but also for prophylactic purposes, concluding that "The *prophylactic* purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary."[35] In awarding a disgorgement of profits in *Strother*, the Supreme Court stated that when imposing an equitable remedy for a prophylactic purpose, causation between the breach of fiduciary duty and the plaintiff's loss *is not relevant*.[36]

This finding from *Strother* served to affirm the Supreme Court's 1997 decision in *Soulos v. Korkontzilas*[37] (a constructive trust case), and was in turn reaffirmed in 2018 in *Williams Lake Indian Band*, in which the majority of the Supreme Court expressly held that "A breach of fiduciary obligation can be found even where the beneficiary has not proven that the breach resulted in a compensable loss, or has not suffered any loss at all".[38]

In seeming opposition to these cases is *Martin v. Goldfarb*.[39] In that case, the plaintiff suffered losses in a series of commercial transactions with a disbarred

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[34] *Strother v. 3464929 Canada Inc.*, 2007 SCC 24 [*Strother*] at para. 77 [emphasis added].
[35] *Ibid.* at para. 74-77 [emphasis in original].
[36] *Ibid.* at para. 77.
[37] *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 [*Soulos*].
[38] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 49. Although compensation was sought in the *Williams Lake* action, this decision concerned a decision on the validity of the relevant land claim, which was being adjudicated by the relevant tribunal *before* it considered the issue of compensation. The Court held that the band must still prove that officials acting on behalf of the federal Crown misused their power or discretion and that this misuse "resulted in a compensable loss", noting: "The extent to which the claimed loss is attributable to Canada's breach, as opposed to provincial intransigence, raises question of causation that the Tribunal has not yet had the opportunity to consider": para. 77.

lawyer—who had previously been convicted of and incarcerated for numerous counts of fraud—in connection with frauds perpetrated by the disbarred lawyer. The plaintiff subsequently went bankrupt. The trial judge held that the respondent law firm had breached its fiduciary duty to the plaintiff (its client) because the firm knew of, but concealed, the disbarred lawyer's identity and background. The plaintiff was initially awarded nearly $6 million in damages "for losses suffered due to the breach of fiduciary duty owed to him by the respondents",[40] but the respondents successfully appealed the damages portion of the judgment,[41] and a new trial was ordered, "limited to an assessment of the damages arising out of the personal losses sustained by the appellant following a breach of fiduciary duty owed to him by the respondents".[42]

In the new trial, the Court awarded no damages on the bases that "inadequate evidence was called to establish the loss; the damages suffered were not a direct personal loss; or, the appellant had failed to establish a causal connection between his loss and the breach of fiduciary duty".[43] This assessment of damages was upheld on appeal; the Court of Appeal affirmed that the plaintiff had not marshalled sufficient evidence to support and quantify his damages claims, and held that "Damages cannot be awarded absent evidence of a causal connection".[44] In this case, the plaintiff had included in his damages claims relating to properties that had belonged to his deceased mother, as well as claims for damages for losses from his corporation. For the two properties Martin did personally own, it was unclear where, or if, the money had been distributed surreptitiously. Therefore, he did not recover damages.

Costs, however, were decided differently. As the finding that the respondents had breached their fiduciary duty to the plaintiff was undisturbed throughout, the Court of Appeal reversed the new trial judge's award of costs against the plaintiff on the basis that there had been "an extremely serious breach of fiduciary duty by professionals".[45]

Even if the result in *Martin*'s second trial was perhaps unexpected, the analysis with respect to causation followed well-established and longstanding precedent that when causation is to be considered at all for breach of fiduciary duty, it is in the assessment of damages—not in establishing liability. This approach is crucial to the principles of equity: even in *Martin*, where no damages were awarded, liability was not erased.

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[39] *Martin v. Goldfarb* (2003), 68 O.R. (3d) 70 (C.A.) [*Martin*].
[40] *Martin* at para. 2.
[41] *Martin v. Goldfarb*, 1998 CarswellOnt 3319 (Ont. C.A.), leave to appeal refused (1999), 239 N.R. 193 (note) (S.C.C.).
[42] *Martin* at para. 4.
[43] *Ibid.* at para. 5.
[44] *Ibid.* at paras. 6, 8.
[45] *Ibid.* at para. 16.

The approach to the causation analysis in *Martin* was thus consistent with both *Canson* and *Hodgkinson*, where the causation questions were concerned with the *extent of losses* the plaintiff could recover from a breaching fiduciary, as opposed to whether *liability* had been made out.

The same is true of lower court decisions, including those of the Court of Appeal of Ontario, which also demonstrate that where causation principles have been applied to actions for breach of fiduciary duty, they have invariably been considered in the context of determining the appropriate equitable remedy—*not* in the analysis of whether liability for an alleged breach of fiduciary duty has been established (at least before the Ontario Court of Appeal's decision in *Stirrett*, discussed further below).

For example, in *Standard Trust Company v. Metropolitan Trust Company of Canada*,[46] the Court of Appeal dismissed an appeal it noted was "on the question of damages alone".[47] In that case, the Court of Appeal upheld the trial judge's decision that the plaintiff could only recover from a trust company that breached its fiduciary duty damages that accrued up until the time that a second company took over the loan that was the subject of the breach.[48]

The distinction between the liability and damages phases of the analysis in a claim for breach of fiduciary duty was underscored in the more recent decision of Morgan J. of the Ontario Superior Court of Justice in *Barker v. Barker*.[49] The trial in that case—which related to involuntary experimental treatments administered to patients in a psychiatric care facility between 1966 and 1983—was divided into two parts, the first covering all liability, causation, defence and limitation issues, and the second covering quantification of damages.[50] In his reasons for the first part of the trial, Justice Morgan held that common law principles do *not* limit the determination of liability for breach of fiduciary duty, although they may affect the determination of remedy, stating:

> . . . breach of fiduciary duty is governed by flexible principles that give the claimant the "full benefit of hindsight": *Canson*. Liability is therefore not limited by principles of the foreseeability or remoteness of the harm caused by the breach. **While quantification of the loss may be a difficult exercise, it is to be kept separate in the analysis and does not cloud the determination of liability.** The Supreme Court confirmed and reiterated this approach in *Williams Lake Indian Band*: "Equity addresses such questions under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established."[51]

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46 *Standard Trust Company v. Metropolitan Trust Company of Canada*, 2007 ONCA 897 [*Standard*].
47 *Standard* at para. 1.
48 *Ibid*. at paras. 3-7, 35-36, 46.
49 *Barker v. Barker*, 2020 ONSC 3746 [*Barker*].
50 At the time of writing, the damages portion of the trial has not been completed.
51 *Barker* at para. 1188 [emphasis added; reference omitted].

PART III DISTINCT POLICY CONSIDERATIONS UNDERLYING EQUITY AND THE COMMON LAW

As noted in both *Canson* and *Hodgkinson*, the rationale for the existence of equitable remedies, and particularly fiduciary duties, is distinct from the policy considerations underlying the common law.

Historically, courts of equity functioned as courts of conscience, seeking to achieve justice through flexible and case-specific analysis rather than through rigidly applied positive laws whose general application did not suit a new or unique situation. They imposed relief primarily to address the wrongdoer's guilty conscience by removing its cause, often an ill-gotten gain, by turning it over to the wronged party. Although there are no longer separate courts of equity, its distinct purpose remains, as expressed through the continued existence of equity's historic causes of action.[52]

As Professor Leonard Rotman has explained, fiduciary law "is premised upon broader principles of fairness and justice than the common law" and "exists to protect important social and economic interactions of high trust and confidence . . . It does this by 'filling in gaps' left by the application of the common law or providing answers to circumstances or situations not contemplated by the common law . . ."[53]

The distinct approaches and purposes of common law and equitable causes of action are not merely academic. In *Canson*, McLachlin, J. (as she then was), distinguished equity and fiduciary obligations from common law claims in more practical terms:

> The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. ***In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest.*** Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. ***The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged.*** The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest" . . . In short,

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[52] Leonard I. Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Juridictional, or Non-Fusion of Legal and Equitable Matters" (2016) 2(2) CJCCL 497 at 503 ("Equity works alongside the law, supporting it where it is deficient and enabling the law to adequately respond to the individual requirements of particular circumstances"); see also p. 506-507 ("the jurisdictional merger of law and equity did not change the various reasons for creating equity in the first place").

[53] Leonard I. Rotman, "Justice Cromwell and Fiduciary Duties: Placing Law into Context", (2017) 80 SCLR (2d) 263 at 301, 300.

> ***equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart***.[54]

Justice McLachlin's reasons in *Canson* also articulated a further practical basis justifying a distinct approach to breaches of fiduciary duty than to negligence or breach of contract, stating:

> . . . because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies than for negligence or breach of contract. As Lord Dunedin put it in *Nocton v. Lord Ashburton*, [1914] A.C. 932, at p. 963: "there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty."[55]

In *Hodgkinson*, LaForest, J., held that an award of damages for breach of fiduciary duty finds support in "a broader justification . . . namely the need to put special pressure on those in positions of trust and power over others in situations of vulnerability",[56] and explained that:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that ***the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy*** . . .[57]

Canadian courts have consistently viewed the equitable cause of action for breach of fiduciary duty as serving not only a plaintiff's personal interest in restitution but also the public interest in preserving the integrity of socially important relationships built on trust. As Justice LaForest explained in *Hodgkinson*: "The law of fiduciary duties has always contained within it an element of deterrence . . . In this way the law is able to monitor a given relationship society views as socially useful . . ."[58] In *McBride Metal Fabricating Corp. v. H&W Sales Company*, the Court of Appeal for Ontario added that fiduciary law, and equity's flexible discretionary remedies for breach of fiduciary duty, are "designed to address not only fairness between the parties, but also the public concern about the maintenance and integrity of fiduciary relationships".[59]

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54 *Canson* at para. 61 per McLachlin J [emphasis added; references omitted].

55 *Ibid.* at para. 64, citing Robert Cooter and Bradley J. Freedman, in "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991), 66 *N.Y.U. L. Rev*. 1045.

56 *Hodgkinson* at para. 93.

57 *Ibid.* at paras. 47-48, citing *Keech v. Sandford* (1726), 25 E.R. 223, Sel. Cas. Ch. 61 (Eng. Ch. Div.) [emphasis added].

58 *Hodgkinson* at para. 93.

Equity's goals and principles were driving considerations in the various reasons written on *Canson* and *Hodgkinson*. Taken together, these cases provide that "a court exercising equitable jurisdiction *is not precluded* from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result".[60]

But while these leading cases provide that principles such as "but for" causation *may* be applied, after liability has been determined and when fashioning a remedy, to assist the court in arriving at a just and equitable result where necessary, they do not provide guidance as to whether (or when) they *must* be applied.

As a result, the role of causation in fiduciary law remains somewhat murky.

Indeed, some commentators have suggested that it is difficult to reconcile the outcomes of *Canson* and *Hodgkinson*. As noted by Professor Rotman,

> . . . in both cases a conflict of interest established the scenario for a second, causally unrelated, event that resulted in greater losses suffered than those emanating from the conflicts of interest... In *Canson*, liability does not extend beyond the breach itself . . . Yet, in *Hodgkinson*, liability extends to the loss in value of the [investments] stemming from the market downturn, notwithstanding the lack of direct correlation between Simms' breach of duty and the market collapse.[61]

Moreover, the Supreme Court was clearly divided in both *Canson* and *Hodgkinson*; each decision contained three sets of reasons and presented different approaches on how common law principles can apply in determining equitable claims. This division, and the different understandings that it engendered, has yet to be reconciled into a cohesive approach. As Professor Rotman has noted, "through its decisions in *Canson* and *Hodgkinson*, the Supreme Court has paved the way for an inevitable clash of equitable and common law principles to be waged on the battlefield of breach of fiduciary obligation".[62]

It is by no means clear from these cases *when* and *how* common law principles such as "but for" causation and intervening acts should be considered in a breach of fiduciary duty claim, other than based on the overriding principle of where it is "necessary to reach a just and fair result".

In *Canson* and *Hodgkinson*, and the jurisprudence since then, these common-law principles have invariably been considered in the context of fashioning the appropriate remedy, *after* liability for breach of fiduciary duty was established—that is, until the Court of Appeal's decision in *Stirrett*.

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[59] *McBride Metal Fabricating Corp. v. H&W Sales Company* (2002), 59 O.R. (3d) 97 (C.A.) at para. 30.

[60] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [*Hodgkinson*] at para. 80 [emphasis added].

[61] Rotman, "The 'Fusion' of Law and Equity?", (2016) 2(2) CJCCL 497 at 517-518.

[62] Leonard I. Rotman, "Balancing the 'Scales of Justice': Fiduciary Obligations and *Stewart v CBC*", (1999) 78:3 Can. Bar. Rev 445 at 479.

PART IV *STIRRETT V. CHEEMA*: ONTARIO COURT OF APPEAL HARMONIZES CAUSATION REQUIREMENTS

In *Stirrett v. Cheema*, the Ontario Court of Appeal held that, notwithstanding that a breach of fiduciary duty had been found by the trial judge,[63] a jury's finding that a physician researcher's breaches of the standard of care in the design and execution of a clinical trial was not the "but for" cause of the loss in negligence precluded a finding that the same physician was liable for a breach of fiduciary duty.

The sections below outline the facts giving rise to the claim; the jury's findings on the negligence claim; the decision of the trial judge to grant the plaintiff's equitable claim in breach of fiduciary duty, notwithstanding the jury's dismissal of the negligence claim on causation grounds; and the reasons of the Court of Appeal reversing the trial judge's decision awarding equitable compensation for breach of fiduciary duty.

1. Summary of Facts — *Stirrett v. Cheema*

David Stirrett, age 54, required an angioplasty for a blockage in his artery. When he arrived at St. Michael's Hospital for his angioplasty, Mr. Stirrett was recruited to participate in a clinical research trial for which Dr. Strauss was Principal Investigator (the "**Study**"). The Study sought to determine whether the use of insulin could have an impact on recurrence of stenosis (blockages) in patients treated with arterial stents.[64] Participants in the Study would undergo a follow-up angiogram six months after their stents were implanted, solely for research purposes—not because it was medically indicated.[65]

Research ethics principles played an important role in the case. In Canada, research on human subjects must protect a human research participant's dignity and safety. To accomplish this, a Research Ethics Board ("**REB**"), independent of the research team, is responsible for deciding whether a given study may proceed. In making that decision, REBs must balance the risk of harm to participants against how valuable the outcome of the research would be. Research ethics policies also impose strict disclosure obligations on researchers, including the requirement that they provide "full and frank disclosure of all information relevant to free and informed consent" to participants.[66]

Dr. Strauss required approval from the hospital's REB to commence the Study, and on an annual basis thereafter to continue the Study. To obtain this approval, he submitted a protocol detailing the Study's parameters, including:

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[63] Pursuant to s. 108 of the *Courts of Justice Act*, RSO 1990, c C.43, issues of equitable relief must be decided by a judge and not a jury.

[64] CA Reasons at paras. 5, 7; Trial Reasons at para. 13.

[65] CA Reasons at para. 8; Trial Reasons at para. 13.

[66] CA Reasons at para. 10; Trial Reasons at paras. 5, 34.

a. Participation of 240 patients (a sample size large enough for the results to be statistically valid);
b. A "Data Safety Monitoring Board" would be set up to "oversee the progress of the trial and monitor the safety of the intervention";
c. A consent form that would provide "full and frank disclosure of all information relevant to free and informed consent", and would be signed by all participants.[67]

In 2002, the REB approved the Study based on the terms set out in this protocol.[68] However, the Study as executed by Dr. Strauss was different from what the protocol contemplated. The Study had difficulty acquiring participants; after two years, only 55 patients had been enrolled, and as a result of the low enrollment the Heart & Stroke Foundation terminated its funding for the Study in 2003.[69] Moreover, the Data Safety Monitoring Board required by the protocol ("**DSMB**") was never established.[70]

On January 26, 2004, in response to the low enrollment and termination of funding, Dr. Strauss proposed proceeding with a re-designed version of the Study, aiming to recruit only 100 participants.[71] This was a material change, because the substantially lower enrollment would mean the Study would have too small a sample size to reliably answer the primary question.

Although some of the other physicians leading the Study at other hospitals suggested that the REBs be informed about this "significant redesign",[72] (noting that while there may still be some worthwhile findings despite the low enrollment, "The issue is whether they are worthwhile enough to justify the research-related risks"), Dr. Strauss disagreed.[73] When he submitted the requisite annual update to the REB just two weeks later, he concealed the change in enrollment target (and its implications for the statistical validity of the Study), the termination of the Study's external funding, and the decision not to establish the DSMB.[74]

On February 12, 2004, the REB approved the Study to continue for a further 12 months—without knowing that the Study had been redesigned, and without the opportunity to assess whether the findings of the redesigned Study would be "worthwhile enough to justify the research-related risks."

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67 CA Reasons at para. 11; Trial Reasons at para. 8.
68 CA Reasons at para. 11; Trial Reasons at para. 12.
69 Trial Reasons at para. 15.
70 *Ibid*. at para. 21.
71 *Ibid*. at para. 16.
72 *Ibid*. at para. 17; Email chain between Dr. Peter Seidelin, Dr. Eric Cohen, Dr. Bradley Strauss, Nurse Anne Fry, and others dated January 26-30, 2004, on file with authors.
73 Trial Reasons at para. 17.
74 *Ibid*. at paras. 16, 21.

Dr. Strauss also failed to change the Study's consent documents to reflect this "significant redesign". When he was recruited to participate in the Study on June 11, 2004, Mr. Stirrett was presented with a consent form stating that he would be participating in a "study of about 240 patients" sponsored by the Heart and Stroke Foundation.[75] Mr. Stirrett was never informed that both these pieces of information were incorrect[76]—even though the consent form had expressly provided that any new information that developed during the research "and might influence your willingness to participate in the study" would be disclosed.[77]

Mr. Stirrett signed the consent form agreeing to participate in the Study on this basis. His (medically required) angioplasty procedure proceeded that day without incident.[78]

On February 10, 2005, Mr. Stirrett underwent the follow-up angiogram performed solely for the purpose of the Study.[79] During the course of that angiogram, a serious complication occurred. Mr. Stirrett's organs soon began to fail. On February 12, 2005, Mr. Stirrett was taken off life support, and he died later that day.[80]

The Study ultimately had only 78 participants. The results were eventually published in 2012, but they were inconclusive.[81]

2. Trial (by Judge and Jury)

In 2006, David Stirrett's widow, Karen Stirrett, commenced an action against Dr. Strauss in negligence and in breach of fiduciary duty.[82] Although the issues of negligence were to be determined by a jury, the *Courts of Justice Act* requires that any claim for equitable relief be determined by a judge.[83]

The jury found that Dr. Strauss "breached the standard of care of a reasonable and prudent principal investigator at St. Michael's Hospital for the STREAM study", identifying four particular breaches,[84] but answered "no" to the question they were asked on causation, which was phrased as follows: "has the Plaintiff proven on a balance of probabilities that but for the breach of the

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75 CA Reasons at para. 17; Trial Reasons at paras. 18-20.
76 Trial Reasons at para. 19.
77 CA Reasons at para. 16; Trial Reasons at para. 20.
78 Trial Reasons at para. 25.
79 *Ibid*. at para. 18.
80 *Ibid*. at paras. 28-29.
81 *Ibid*. at para. 32.
82 She also commenced an action against the two physicians who had performed the second angiogram, Dr. Cheema and Dr. Sheth, which were dismissed and were not the subject of the appeal below.
83 Trial Reasons at para. 1; see *Courts of Justice Act*, RSO 1990, c C-43, s. 108(2)(1)(xi).
84 Questions to the Jury, Court File No.: 06-CV-305803PD1 (on file with authors) [Jury Verdict]; Trial Reasons at para. 2.

standard of care described in your answer [above], David Stirrett's [*sic*] would not have undergone the angiogram on February 10, 2005".[85]

Because the jury did not find the plaintiff had proven the causation element (on a balance of probabilities applying the "but for" test), the negligence claim against Dr. Strauss was dismissed.

In determining the equitable claim for breach of fiduciary duty, however, the trial judge granted judgment to the Plaintiff. Justice Grant Dow of the Ontario Superior Court of Justice found that Dr. Strauss owed a fiduciary duty to David Stirrett and breached that fiduciary duty.[86] He held that "The obligation of a researcher to the participant when it involves humans is more strict than a doctor to patient relationship" and, adopting a statement by McLachlin J. (as she then was) in *Norberg v. Wynrib*, concluded that the relationship between Dr. Strauss as Principal Investigator in an experimental research study on humans and Mr. Stirrett as human research subject "shares the peculiar hallmark of the fiduciary relationship".[87]

The trial judge concluded that Dr. Strauss' "fiduciary duty was to comply with the terms set out in the consent form as drafted and agreed by David Stirrett".[88] He rejected Dr. Strauss' suggestion that the changes made to the Study were not significant and did not change the risk of harm to David (and therefore did not need to be disclosed to him), finding that this "was not something for Dr. Strauss to decide. His obligation, or duty, was to pass on these changes to David Stirrett (and to the Research Ethics Board) in order to permit them to re-evaluate their previous decision".[89] As Dr. Strauss failed to comply with the terms set out in the consent form and pass along the changes to the study to Mr. Stirrett and the REB, he breached his fiduciary duty.[90]

Although his reasons noted that there was evidence that the Study should have been stopped because of these changes, "because it could no longer fulfill its primary objective and had not specified any secondary objectives", the trial judge did not make any findings about whether this should or would have happened if the REB had been informed in accordance with Dr. Strauss' fiduciary duty.

After finding that Dr. Strauss had breached his fiduciary duty, the trial judge went on to hold that causation does not form part of "the analysis on whether there will be recovery" in a claim for breach of fiduciary duty, as occurs in a claim in negligence.[91] The trial judge's reasons in this regard were just two

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85 Jury Verdict, *supra*.
86 Trial Reasons at para. 48.
87 *Ibid*. at para. 47, citing *Norberg* at para. 47, per McLachlin J, concurring, ABOA Tab 4.
88 Trial Reasons at para. 49.
89 *Ibid*. at para. 50.
90 *Ibid*. at para. 51.
91 *Ibid*. at para. 52.

paragraphs; he relied upon the reasons of McLachlin J. in *Norberg v. Weinrib*, in which she held that "The physician is pledged by the nature of his calling to use the power the patient cedes to him exclusively for her benefit. *If he breaks that pledge, he is liable*"; and "Equity has always held trustees *strictly accountable* in a way that the tort of negligence and contract have not".[92]

On the basis that the parties had agreed on the damages that flowed from the follow-up angiogram, the trial judge found it unnecessary to conduct an assessment of the damages that flowed from Dr. Strauss' breach of fiduciary duty.[93] He ordered judgment against Dr. Strauss in the amount the parties had agreed upon.[94]

3. Court of Appeal Decision

Dr. Strauss appealed the trial judgment against him, arguing that (1) the Trial Judge erred in finding that he owed a fiduciary duty to David Stirrett as a human participant in an experimental research trial; and (2) the Trial Judge had erred in determining that a finding of causation did not form part of the liability analysis for breach of fiduciary duty.

The Court of Appeal declined to decide the first issue. It emphasized that at issue on the appeal was not whether medical researchers owe a *per se* fiduciary duty to research participants generally, but rather whether the trial judge erred in finding that Dr. Strauss owed an *ad hoc* fiduciary duty to Mr. Stirrett in the particular circumstances of the case. The Court of Appeal held that on the facts of this case "the elements of vulnerability and discretion are fully supported by the evidence",[95] but that given its finding on the second issue, regarding causation, it was not necessary for it to make any determination on this point.[96] In so finding, the Court of Appeal held:

> In declining to deal with this issue, we should not be taken as expressing any opinion on whether the trial judge was correct in accepting that a fiduciary duty was owed to Mr. Stirrett, or that, if a duty were owed, it was the duty articulated by the trial judge. Nor should these reasons be read as foreclosing or requiring a finding of a fiduciary relationship between a medical researcher and study participant in another case. The presence or absence of a fiduciary relationship will depend on the evidence in each particular situation.[97]

The Court of Appeal allowed Dr. Strauss' appeal on the basis that "the trial judge erred in failing to consider and determine the issue of causation", which

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[92] *Ibid.* at para. 53, citing *Norberg v. Weinrib*, [1992] 2 S.C.R. 226 at paras. 95 and 98, additional reasons *Norberg v. Wynrib*, 1992 CarswellBC 338 (S.C.C.) [emphasis added].
[93] Trial Reasons at para. 54.
[94] *Ibid.*
[95] CA Reasons at para. 55.
[96] *Ibid.* at para. 61.
[97] *Ibid.* at para. 62.

the Court of Appeal held was "dispositive of the appeal".[98] It held: "Simply put, for compensation to be awarded for breach of fiduciary duty, the plaintiff must establish that the defendant's breach caused the plaintiff's loss",[99] and continued:

> Considering and applying the correct principles with respect to the issue of causation afresh, assuming that the appellant owed an *ad hoc* fiduciary duty to Mr. Stirrett and breached that duty, we conclude that there was no causal link between the appellant's breach and the angiogram Mr. Stirrett underwent that led to his death. Moreover, the jury's determination with respect to "but for" causation in the negligence claim is determinative. In the result, the respondent is not entitled to damages.[100]

The Court of Appeal acknowledged that there is some confusion over the role of causation because the word "causation" is sometimes used "both to describe [1] causation in fact and [2] as part of the test for applying common law limiting factors to limit the extent of a damages claim",[101] noting:

> There is of course a difference between the right to a remedy, and the assessment of damages. Causation in fact is relevant to the first issue. Legal causation, which incorporates limiting factors such as remoteness, proximity, foreseeability, and intervening act, is part of the second issue.[102]

The Court emphasized that "[t]hese two uses should not be confounded".[103]

The Court of Appeal concluded that "cause in fact is required in the fiduciary context".[104] It proceeded to review the Canadian case law (canvassed above in Part II), and held that it demonstrated that "a plaintiff seeking compensation for breach of fiduciary duty must establish that the losses flowed from the breach".[105]

With great respect, while the case law does support the latter proposition, the former proposition represented an extension of the law to date—and indeed may have confounded the two uses of "causation" (*i.e.* in establishing a right to a remedy vs. in assessing damages, or determining the extent of the remedy to be awarded).

In determining that the plaintiff was required to prove cause in fact as part of the liability analysis, the Court of Appeal expressly held, for the first time in Canadian law, that "causation in the context of a breach of fiduciary duty is

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[98] *Ibid.* at para. 65, 63.
[99] *Ibid.* at para. 65.
[100] *Ibid.* at para. 66.
[101] *Ibid.* at para. 70.
[102] *Ibid.* at para. 69 [emphasis added].
[103] *Ibid.* at para. 70.
[104] *Ibid.* at para. 74; see also paras. 71-73.
[105] *Ibid.* at para. 90.

properly characterized as 'but for' causation", which it noted "is not simply a common law concept".[106]

The Court of Appeal rejected the argument that it was even open to the trial judge to conclude that there was a causal link between Dr. Strauss' breach of fiduciary duty and Mr. Stirrett's follow-up angiogram, based on evidence that the Study would not have continued if Dr. Strauss had made disclosure to the REB, or would have been stopped by a DSMB, had one been established as was required. The Court held that accepting this argument "would require the court, in assessing the fiduciary duty claim, to make findings that are inconsistent with those made by the jury on the negligence claims".[107] It noted that the jury's "no" answer on causation necessarily meant that it "could not have been satisfied that, but for the breaches of the standard of care, either the Study would have been stopped, or Mr. Stirrett would have chosen not to participate".[108]

In the result, notwithstanding the prohibition in the *Courts of Justice Act* against a jury determining an equitable claim (or that the jury's particularized breaches of the standard of care differed from how the trial judge characterized Dr. Strauss' breach of fiduciary duty),[109] the Court of Appeal found that "the jury's determination with respect to 'but for' causation in the negligence claim is determinative" of the plaintiff's claim in fiduciary duty.[110] Relying on the jury's finding in response to the question put to it as trier of fact for the negligence claim, the Court of Appeal concluded that "there was no causal link between the appellant's breach and the angiogram Mr. Stirrett underwent that led to his death".[111]

Accordingly, the Court of Appeal held the plaintiff was not entitled to a remedy and dismissed the action in its entirety.

Ms Stirrett brought an Application for Leave to Appeal to the Supreme Court of Canada, but it was dismissed on November 26, 2020.

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[106] *Ibid*. at para. 107.
[107] *Ibid*. at para. 116.
[108] *Ibid*. at para. 121.
[109] At paragraph 123, the Court of Appeal held: "To the extent that, in finding a breach of fiduciary duty, the trial judge pointed to failures that were not identified by the jury . . . these additional failures are similar in nature to the jury's findings on the particulars of the appellant's breach of his standard of care, and would not affect the outcome."
[110] CA Reasons at para. 66.
[111] *Ibid*. at para. 66. This finding is particularly noteworthy in light of the finding of fact that the angiogram Mr. Stirrett underwent "was not to be done as part of regular clinical practice but only for medical research purposes.": Trial Reasons at para. 13.

PART V IMPLICATIONS OF STIRRETT: MORE FUSION, LESS CONFUSION BUT AT WHAT COST?

1. Fusion and Confusion: Harmonizing the Tests for Causation in Negligence and Breach of Fiduciary Duty

The Court of Appeal's decision in *Stirrett* may be viewed by some as a win for clarity in the law. As discussed in Part II above, while *Canson* and *Hodgkinson* had referred to the need for "a *link* between the equitable breach and the loss for which compensation is awarded"[112] or a determination of "the losses *flowing from* the breach",[113] the nature of the link required was left undetermined.

Indeed, Justice McLachlin's reasons in *Canson* suggested that the nature of the link may be distinct from that which applied in negligence; she held: "The requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that 'causality' in the legal sense as limited by foreseeability at the time of the breach does not apply".[114]

The Court of Appeal's decision in *Stirrett* eliminates any uncertainty about the nature of the "link" required between alleged losses and an alleged breach of fiduciary duty. The Court squarely held: "causation in the context of a breach of fiduciary duty is properly characterized as 'but for' causation. 'But for' causation is not simply a common law concept".[115]

But clarity in this regard may have come at the cost of confusion on another front. The Court of Appeal held:

> There is of course a difference between the right to a remedy, and the assessment of damages. Causation in fact is relevant to the first issue. Legal causation, which incorporates limiting factors such as remoteness, proximity, foreseeability, and intervening act, is part of the second issue.
>
> We acknowledge that a source of confusion over the role of causation is in the use of the word "causation" in some of the cases both to describe causation in fact and as part of the test for applying common law limiting factors to limit the extent of a damages claim. These two uses should not be confounded.[116]

With great respect to the Court of Appeal, its reasons may have indeed confounded these two uses. In concluding that but-for causation must be found in a claim for breach of fiduciary duty, it relied exclusively on cases[117] in which

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[112] *Canson* at para. 77 per McLachlin J.
[113] *Hodgkinson* at para. 3.
[114] *Canson* at para. 78 per McLachlin J.
[115] CA Reasons at para. 107.
[116] *Ibid.* at paras. 69-70.
[117] *Ibid.* at paras. 76-90, citing *Canson; Hodgkinson; Martin;* and *Standard* (all of which are discussed in Part III(c), above) and *Waxman v. Waxman*, 2004 CarswellOnt 1715 (C.A.), additional reasons 2004 CarswellOnt 6554 (C.A.), additional reasons 2004 CarswellOnt

causation was considered in the second sense: as a factor that limited the quantum of damages assessed—only *after* liability for breach of fiduciary duty (and the plaintiff's right to an equitable remedy) had been established.

The Court nevertheless relied on these cases in support of its holding that "*cause in fact* is required in the fiduciary context",[118] after having found that cause in fact is relevant to establishing a right to a remedy.

In other words, the Court of Appeal held a plaintiff must demonstrate causation in fact (or but-for causation) to be entitled to a remedy for breach of fiduciary duty.

This was an extension of the law to date, which gives rise to two concerns.

First, it was not too long ago that the Supreme Court of Canada sought to resolve confusion in the law respecting what must be proven to establish a breach of fiduciary duty with its decisions in *Galambos v. Perez*[119] and *Alberta v. Elder Advocates*.[120] In neither case was a fiduciary duty in fact established. But it appears that *Stirrett* may have in effect added to the "test" for breach of fiduciary duty articulated in the leading cases, by holding that to establish liability a plaintiff must prove factual causation *in addition to* demonstrating the existence of a fiduciary duty and its breach as laid out in *Galambos* and *Elder Advocates*.

Second, the suggestion that a plaintiff must demonstrate factual causation to be entitled to a remedy for breach of fiduciary duty is inconsistent with the Supreme Court of Canada's statements in *Strother* and *Williams Lake*. The Court in *Williams Lake* held: "where breach of fiduciary duty is alleged, questions of causation are addressed 'under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established'",[121] and added: "A breach of fiduciary obligation can be found even where the beneficiary has not proven that the breach resulted in a compensable loss, or has not suffered any loss at all".[122]

3955 (C.A.), additional reasons 2004 CarswellOnt 4941 (C.A.), additional reasons 2004 CarswellOnt 3956 (C.A.), leave to appeal refused 2005 CarswellOnt 1217 (S.C.C.) (which was cited for its proposition that "[t]he basic rule of equitable compensation is that the injured party will be reimbursed for all losses flowing directly from the breach").

[118] CA Reasons at para. 74.

[119] *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247.

[120] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261.

[121] *Williams Lake* at para. 48.

[122] *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 at para. 49. The Court in *Williams* further held: "where breach of fiduciary duty is alleged, questions of causation are addressed "under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established": para. 48. Although compensation was sought in the *Williams Lake* action, this decision concerned a decision on the validity of the relevant land claim, which was being adjudicated by the relevant tribunal *before* it considered the issue of compensation. The Court held that the band must still prove that officials acting on behalf of the federal

In *Strother*, the Court held that when imposing an equitable remedy for a prophylactic purpose, causation between the breach of fiduciary duty and the plaintiff's loss *is not relevant*, and accepted that equity calls for the imposition of a remedy for breach of fiduciary duty "even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship".[123]

Of course, there is an obvious distinguishing factor at play here—in *Stirrett*, the remedy sought was equitable damages, whereas in *Strother*, the remedy sought was an accounting of profits.

But where the question is whether the plaintiff has established liability, or a right to a remedy, the remedy sought should not make a difference.

We would respectfully suggest that the Court of Appeal's reasons in *Stirrett* can be reconciled with these other cases if understood on the basis that causation must be considered "under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established",[124] as the Supreme Court held in *Williams Lake*. Although such a reading may be at odds with the Court's statements about how cause in fact is relevant to the *right to a remedy*,[125] it could be supported by the Court of Appeal's earlier statement of the point as follows: "there must be a causal link between the breach of fiduciary duty and *the compensation sought*".[126]

This reading of the reasons is not only consistent with the approach in the cases on which the Court of Appeal relied but, on the facts of *Stirrett*, would in all likelihood have resulted in the same outcome.

The Court of Appeal was quite fairly concerned that finding a causal link between Dr. Strauss' breach of fiduciary duty and Mr. Stirrett's February 2005 angiogram in the context of the breach of fiduciary duty claim would require it "to make findings that are inconsistent with those made by the jury on the negligence claims".[127] Although the *Courts of Justice Act* requires that any claim for equitable relief be determined by a judge—thus necessitating two triers of fact in the same case in *Stirrett*, as a jury notice had been served in respect of the negligence claim—the spectre of inconsistent findings of fact made by a judge and jury in the same action presents legitimate concerns.

Crown misused their power or discretion and that this misuse "resulted in a compensable loss", noting: "The extent to which the claimed loss is attributable to Canada's breach, as opposed to provincial intransigence, raises question of causation that the Tribunal has not yet had the opportunity to consider": para. 77.

123 *Strother v. 3464929 Canada Inc.*, 2007 SCC 24 [*Strother*] at para. 77 [emphasis added].

124 *Williams Lake* at para. 48.

125 CA Reasons at paras. 69-70.

126 *Ibid.* at para. 68 [emphasis added].

127 *Ibid.* at para. 117.

The Trial Judge sought to avoid making inconsistent findings by holding that "the finding of a fiduciary duty and the breach of that duty removes causation from the analysis *on whether there will be recovery* as occurs in the determination of negligence followed by causation".[128] In other words, he held that cause in fact was not necessary to establish liability for breach of fiduciary duty. This was consistent with the law to date.

The Trial Judge continued, however, to award the agreed-upon quantum of damages to the plaintiff without considering causation *at all*. Possibly because an assessment of damages was not required due to the parties' agreement on quantum, the Trial Judge did not consider cause in fact "under the heading of remedy or damages"; his consideration of damages was limited to finding that the parties had agreed on damages, and that there shall be judgment in favour of the plaintiff in that amount.[129]

The Court of Appeal concluded that "the trial judge erred by not taking into account causation and awarding damages for the breach . . . the respondent was not entitled to compensation because the breach did not cause Mr. Stirrett to undergo the February 2005 angiogram that led to his death".[130]

It could have arrived at the same outcome, and provided more doctrinally consistent reasons, if it had corrected the Trial Judge's analytical error by finding that cause in fact must be considered "under the heading of remedy or damages once the existence and breach of a fiduciary obligation have been established", as *Williams Lake* suggests.

The only remedy sought by the plaintiff in *Stirrett* was equitable damages—there was no basis to assert disgorgement, or a proprietary remedy. It was open to the Court of Appeal to rely on *Canson* and *Standard Trust Company*, for example, to find that even if a breach of fiduciary duty had been established, damages could not be awarded because "the losses made good are only those which, on a common sense view of causation, were caused by the breach".[131] On that basis, the Court of Appeal could have found, as it did, that the jury's factual findings on causation in the context of liability for negligence were dispositive of the question of whether Mr. Stirrett would have undergone the February 2005 angiogram but for Dr. Strauss' breach.[132] In doing so, the Court could have clarified that "but for" is the appropriate standard to apply when considering this "common sense view of causation"—thus clarifying the

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[128] Trial Reasons at para. 52.
[129] *Ibid.* at para. 54.
[130] CA Reasons at para. 4.
[131] *Standard* at para. 46, citing *Canson*.
[132] See CA Reasons at paras. 121-123. While the authors (who served as counsel to the Respondent) do not necessarily agree with the Court's findings in this regard, the point here is that this conclusion flows equally from a finding that there is no cause-in-fact in the liability analysis (as the Court held) and from a finding that the breaches did not in fact cause the claimed loss, in the remedy analysis.

nature of the applicable "link", without confounding the liability and remedy stages of the analysis.

In sum, it is respectfully suggested that while the Court of Appeal's reasons eliminated confusion in one way—by clarifying that the "but for" test can apply to determine causation in equitable claims as well as in negligence, and that this is the nature of the "link" required between a breach of fiduciary duty and the remedy sought—they introduced confusion in another, by analyzing causation under the heading of liability, rather than remedy. But if the Court of Appeal's reasons are read to accept that the plaintiff had a right to a remedy for breach of fiduciary duty, but that the sole remedy sought—equitable damages—was not available because the requisite "but for" link between the breach and the claimed loss was not established, they would be consistent and could be reconciled with the Supreme Court of Canada's jurisprudence.

2. Practical Effect of the "But For" Test in Fiduciary Law: Some Hypotheticals

As noted above, the Court of Appeal's reasoning in *Stirrett* departs from the historical jurisprudence on breach of fiduciary duty in two major ways: first, in that causation was apparently analyzed at the liability stage, rather than as part of the determination of remedy, and second, in that the Court of Appeal articulated that for a plaintiff to be successful in a claim for breach of fiduciary duty, a "but for" causal link, as opposed to simply "a causal link", *must* be made out.

Regardless of where in the analysis the causation requirement must be met, however, a further question arises: if there is now a requirement that a plaintiff prove "but for" causation, precisely what "but for" link must be established? Is it between a breach of fiduciary duty and a plaintiff's loss, or can the requisite link to be analyzed be between a breach and a defendant's gain therefrom? In negligence law, of course, the plaintiff must establish that their *loss* would not have occurred but for a defendant's breach. Does it necessarily follow that the same link must now be established in claims for breach of fiduciary duty?

While the Court of Appeal suggested in its reasons that their holdings on causation differ from previous cases only as a matter of semantics,[133] it is instructive to consider how a requirement that "but for" causation be made out as it is in negligence would apply in other factual scenarios that have given rise to fiduciary duty claims.

Consider, for example, how applying but for causation to determine entitlement to a remedy would have affected the outcome in *Canaero*. Recall that in *Canaero* it was found as a fact that the plaintiff company could not have obtained the Guyana contract that it was determined that the fiduciaries,

[133] CA Decision at para. 108.

O'Malley and Zarzycki, were required to disclose to it. There was no suggestion, and indeed it was ruled out, that "but for" the breach of fiduciary duty, Canaero would have obtained the contract. But Chief Justice Laskin held that O'Malley and Zarzycki's liability for breach of fiduciary duty "does not depend on proof by Canaero that, but for their intervention, it would have obtained the Guyana contract." Rather, he premised liability on the basis that Canaero "is entitled to *compel the faithless fiduciaries to answer for their default* according to their gain."

How, then, would the Court of Appeal's decision in *Stirrett* affect the outcome in Canaero? At first blush, it would seem that applying *Stirrett*'s ratio would lead to the claim in Canaero being dismissed. The Court of Appeal's decision explains that "but for" causation raises the counterfactual question: what would likely have happened if the defendant had discharged his or her duty?" In *Canaero*, based on the trial judge's findings, it would seem that the answer to the question "but for O'Malley's[134] breach of fiduciary duty, what would likely have happened" would be: "nothing". Canaero would not have obtained the contract. There would be no causal link made out between the fiduciary's breach and Canaero's loss—because there was no loss. If this were the relevant question, then *Canaero* would not have resulted in recovery for the plaintiff.

However, "but for the breach of O'Malley, would Canaero have obtained the Guyana contract" may not be the only "but for" question available on the facts—particularly given fiduciary law's consideration of and focus on fiduciaries' conduct. If the question is not "but for the breach of O'Malley, would Canaero have suffered a loss" but rather "but for the breach of O'Malley, would O'Malley have obtained a benefit", the reasoning in *Stirrett* would likely have nevertheless resulted in recovery. Presumably, if O'Malley had not breached his duty and thereby gained the Guyana contract by illicit means, he would not have made the profit associated with it. If the requisite "but for" causal link can be made between a fiduciary's breach and a corresponding gain, as opposed to a fiduciary's breach and a plaintiff's loss, then the result of *Canaero* would be the same.

Note that, in either scenario, O'Malley's breach is the same. In either scenario, Canaero's loss is the same — there is none. The difference between a plaintiff obtaining no recovery in the first instance and a favourable judgment in the second is not whether there was a breach of fiduciary duty, or how the breach affected Canaero, but rather how the breach affected *O'Malley*. Because O'Malley made a profit, a restitutionary remedy could be claimed based on O'Malley's gain, as opposed to a compensatory remedy claimed in respect of Canaero's loss. The availability of a remedy based on O'Malley's gain in turn

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[134] For the purposes of these illustrations, O'Malley and Zarzycki will be treated as one actor.

allows for a different causation question to be asked—would O'Malley have profited, *not* would Canaero have suffered a loss—even though the fact of the breach is identical.

In other words, it would appear that the law on causation for breach of fiduciary duty as stated in *Stirrett* must be concerned not just with the fact of the breach itself, which stands in either case, but with the fiduciary actually profiting off of his dereliction of duty.

If we tweak the facts of *Canaero*, this concept emerges more clearly. Assume all else is the same, but that instead of taking the Guyana contract for himself, O'Malley passed the opportunity on to an innocent third party, who acted on it. Assume further that O'Malley was not compensated in any way for this opportunity, and that the third party has no indication as to how O'Malley had come to discover the opportunity. How would liability be approached in that situation? There is still a breach of fiduciary duty on O'Malley's part. There is still no loss suffered by Canaero. There is still a profit made from this opportunity—just not one made by O'Malley. The innocent third party could not be liable to Canaero. But if that is the case, where would the "but for" causation flowing from O'Malley's breach lead to? Not a loss by Canaero, and not a profit to O'Malley. On those facts, if Canaero had to prove "but for" causation, it seems that there would be no recovery for Canaero.

If the foregoing is correct, liability for the "faithless fiduciary's" misappropriation of the same contract would be evaded because it was an innocent third party and not the breaching fiduciary who benefited from the breach. This would suggest that the Court of Appeal's reasons in *Stirrett* may be more concerned about breaches of fiduciary duty that result in tangible benefit to the breaching fiduciary or tangible loss to the beneficiary, than about breaches of fiduciary duty at large.

Returning to *Stirrett*, the question that arises is: would the result have been the same if a different remedy had been available in respect of the same breach? If, instead of focusing on the plaintiff's loss, the focus was on the fiduciary's gain, as in *Canaero*, could a different "but for" connection be established? On the facts of *Stirrett*, there was no basis to suggest that Dr. Strauss obtained a tangible gain from his breach of fiduciary duty; there was no suggestion, for example, that he received payments for his role in the Study, or that he otherwise had a financial incentive tied to its completion or success. Because there was no profit to Dr. Strauss, no disgorgement or other restitutionary remedy could be claimed, and in the result, there was no alternative "but for" question to ask.

For illustrative purposes, however, it is useful to consider how the Court of Appeal's analysis might have applied if Dr. Strauss had made a profit from his role in the Study. If, for example, he had been compensated $30,000 for designing and overseeing the Study upon its completion, the question could be asked: but for Dr. Strauss' breach of fiduciary duty, would he have profited?

If the answer to that question were determined to be "no",[135] the plaintiff would have been successful in proving their claim for breach of fiduciary duty—even though Dr. Strauss' *breach* would be the same as it was on the actual facts, the outcome would have been different because he would have, in this scenario, received a benefit. This suggests that what dictates whether liability can be made out is not whether there is a breach of a right, but rather the availability of the remedy that can be claimed. This supports a reading of *Stirrett* that prioritizes deterrence of a fiduciary profiting from a breach of their duty, rather than deterrence of the breach of that duty itself.

3. Compromising Equity's Noble Goals

By articulating a burden on the plaintiff to prove a "but for" causal connection between a defendant's breach of fiduciary duty and a corresponding loss (or gain), the Court of Appeal has in many ways streamlined a complex analysis. In doing so, that Court has also signalled that the debate first raised between *Canson* and *Hodgkinson* may ultimately be resolved in favour of common law principles becoming more influential in equitable contexts.

It is thus worthwhile to revisit the goals of equity, from which breach of fiduciary duty as a cause of action emanates. If the causation tests have been harmonized, and the near-complete flexibility with which equity has historically been entitled to respond to breaches of fiduciary duty must now be exercised with reference to a common law approach to causation, what are the implications for achieving equity's noble goals?

The suggestion that the broad goals of equity have had a practical impact on the adjudication of cases for breach of fiduciary duty is not entirely academic. Historically, the principles of equity have not been mere considerations in the analysis of a case—it has been suggested that policy objectives can be determinative of the analysis to be followed.

In *Canson*, Justice LaForest acknowledged that bringing an action in equity can be desirable to fulfill certain policy objectives. In contrast to the Court of Appeal's holding that Plaintiff's claim in equity in *Stirrett* must fail because a similar, though not identical, common law claim in negligence did, Justice LaForest directed that "Where a situation requires different policy objectives, then the remedy may be found in the system that appears more appropriate. This will often be equity. Its flexible remedies . . . must continue to be moulded

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[135] The answer to this question cannot be extrapolated from the jury's answer to the causation question under negligence, because in that analysis the focus is always on the impact to the plaintiff. While the authors are not in a position to speculate what the answer to this "but for" question would be, we note that there was evidence at trial that supported the suggestion that the Study would have been stopped if the REB had been informed of the various ways it was proceeding that deviated from the established protocol, but that this question was not determined by the trial judge.

to meet the requirements of fairness and justice in specific situations", and "Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result. The foundation of the obligation sought to be enforced . . . is 'the trust or confidence reposed by one and accepted by the other or the assumption to act for the one by that other'".[136]

While it has been emphasized that equity does not exist as a panacea for all civil woes, equity's flexibility to right a wrong, including in the service of preserving trust in important social relationships, has been emphasized just as clearly.

The deterrence aspect of fiduciary law goes to its very heart. In *Hodgkinson*, Justice LaForest canvassed the policy underlying fiduciary duties, noting that "The law of fiduciary duties has always contained within it an element of deterrence . . . In this way the law is able to monitor a given relationship society views as socially useful . . . ."[137] Conceptually, these considerations go back almost 300 years to *Keech v. Sanford*, and the foundation of fiduciary law.

The dual commitments to deterrence and to flexibility in fiduciary law are not coincidental. As LaForest J. explained, the flexibility exists to promote deterrence:

> The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.[138]

Perhaps in connection with the somewhat awkward reconciliation of his ruling with his decision in *Canson*, in *Hodgkinson* Justice LaForest again stressed the inherent flexibility of the fiduciary analysis, holding that "a court exercising equitable jurisdiction *is not precluded* from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result".[139]

Justice LaForest's comments about the principles that animate equity in *Canson* and *Hodgkinson* align with those of his colleagues. While Justices LaForest and McLachlin took different analytical approaches in *Canson*, they were both concerned with the rationale for imposing fiduciary obligations. Justice McLachlin observed a key difference between tort and contract, as opposed to equity, stating: "the rationale for equitable compensation are

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[136] *Canson* at paras. 52-56 *per* LaForest J.
[137] *Hodgkinson* at para. 93.
[138] *Ibid*. at para. 48.
[139] *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [*Hodgkinson*] at para. 80 [emphasis added].

distinct from the tort of negligence and contract . . . In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest."[140] McLachlin J.'s comment also offers a potential reason as to why, in *Stirrett*, the trial judge found it entirely appropriate to arrive at a different finding on causation for breach of fiduciary duty than the jury did in negligence.

Justice McLachlin explained the rationale for equitable compensation as follows:

> . . . because the fiduciary has superior information concerning his or her acts, it will be difficult to detect and prove breach of these wide obligations; and because the fiduciary has control based on the notion of implicit trust, there is a substantial potential for gain through such wrongdoing. This may justify more stringent remedies than for negligence or breach of contract. As Lord Dunedin put it in *Nocton v. Lord Ashburton*, [1914] A.C. 932, at p. 963: "there was a jurisdiction in equity to keep persons in a fiduciary capacity up to their duty."[141]

Although at times consideration and discussion of policy objectives can seem academic, Justice McLachlin's reasons are unambiguous in directing that the policy behind equity be considered in the practical application of breach of fiduciary duty. She explicitly warned against common law concepts overtaking foundational equitable goals—indeed, this was the conceptual basis of her separate reasons.[142] She held that the differences between tort and equity "suggest that we cannot simply assume that an analogy with tort law is appropriate . . . the better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy".[143]

Fiduciary law in Canada has consistently held that the policies behind the imposition of fiduciary duties ought to be considered when the Court analyzes a breach. This was affirmed again by a unanimous Supreme Court in *Strother*, who found that it would be correct in equity and law to impose a remedy for breach of fiduciary duty even where no loss has been suffered not only for the well-recognized intention to "deter fiduciary faithlessness", but also to advance the goals of equity.[144] In addition to the restitutionary purpose, "The *prophylactic* purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary."[145]

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[140] *Canson* at para. 61 per McLachlin J.

[141] *Ibid.* at para. 64, citing Robert Cooter and Bradley J. Freedman, in "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991), 66 *N.Y.U. L. Rev*. 1045.

[142] *Ibid.* at para. 3 per McLachlin J.

[143] *Ibid.* at para. 65 per McLachlin J.

[144] *Strother v. 3464929 Canada Inc.*, 2007 SCC 24 [*Strother*] at paras. 74-77 [emphasis in original].

Returning to *Stirrett*, the finding that a physician researcher breached his fiduciary duty by coordinating and pursuing medical research without adequate independent oversight, and without full disclosure to the participant, was undisturbed. It was found as a fact that Mr. Stirrett underwent the procedure that resulted in his death for the Study, and not for clinical purposes. There was no controversy that a complication during that procedure caused his death. Yet, despite fiduciary law's focus on preservation of social relationships, deterrence, and flexibility, the plaintiff had no remedy because "but for" causation could not be proven.

PART VI CONCLUSION

Canadian jurisprudence has historically considered causation in claims for breach of fiduciary duty only in the context of assessing damages, and only when it was in the interests of justice to do so. The Ontario Court of Appeal's reasons in *Stirrett* represent a shift from this approach by suggesting it is a *requirement* that the plaintiff prove but for causation to establish liability. From this perspective, *Stirrett* represents a further step in the fusion of common law and equity.

But the decision in *Stirrett* can be read another way. It can be reconciled with the longstanding equitable principles enunciated by the Supreme Court of Canada if the reasons are understood as finding that even if there *was* a breach of fiduciary duty for which the plaintiff was conceptually entitled to a remedy, on the facts of the case the specific remedy sought was unavailable due to a failure to establish a "but for" link between the breach and the claimed remedy (equitable damages).

Whether or not the reasons in *Stirrett* will be read as the authors suggest, the Court of Appeal's decision raises a further question, originating in the debate engendered by the Supreme Court of Canada's decisions in *Canson* and *Hodgkinson* about the extent to which it is permissible to analyze breaches of fiduciary duty by reference to the common law. While those cases held that common law concepts *may* be considered in an analysis of breach of fiduciary duty when in the interests of fairness to do so, they went no further. As has been discussed, these decisions, and many others, emphasized not the role of common law principles in the framework for analysis, but rather, the flexibility of equity to promote the goals of fiduciary law, including deterrence.

Does the finding in *Stirrett* that a plaintiff must prove but for causation at the liability stage, as in the common law of negligence, indicate that the broad "jurisdiction in equity to keep persons in a fiduciary capacity up to their duty"[146] been compromised?

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[145] *Ibid.*

[146] *Canson* at para. 64, citing Robert Cooter and Bradley J. Freedman, in "The Fiduciary

To some extent, it appears that equity's nearly unlimited flexibility to achieve a just result may have been curtailed. *Stirrett* is a case where there was a violation of a right without a remedy. Arguably, none of the concerns that fiduciary law exists to protect have been addressed, and there has been no deterrence. From some perspectives, this may be viewed as unjust.

Applying the ratio in *Stirrett* to other scenarios reveals that recovery for a breach of fiduciary duty may turn on whether the breaching fiduciary profited from their breach. For instance, in *Canaero*, if O'Malley himself had not profited from his breach but rather passed the stolen opportunity to an innocent third party, the plaintiff likely would not have received a remedy (and there would have been no deterrence of fiduciary breaches) either. That access to a remedy may vary when the breach of fiduciary duty does not present a conceptual wrinkle.

But *Stirrett* need not be understood as signalling that the fiduciary duty analysis no longer concerns itself with the underlying policies driving equitable remedies. The restitutionary and prophylactic goals of equity are still important. However, it appears the Ontario Court of Appeal's analysis may have the effect of prioritizing those goals more in some contexts than others. As discussed in the scenarios explored above, the imposition of the "but for" causation requirement should not usually serve to limit claims where the plaintiff has suffered a tangible loss, or where a fiduciary has made some tangible gain.

The claims that appear likely to be more restricted are those where a breach of fiduciary duty results in neither a gain to the breaching fiduciary nor a readily definable loss for the plaintiff. In these cases, as in *Stirrett*, a requirement to prove "but for" causation may prevent accountability for breaches of fiduciary duty. If so, *Stirrett* represents a departure from Canadian fiduciary law to date not only due to the imposition of the "but for" requirement but also because, in creating said requirement, the broad flexibility of equity to achieve a fair result may have been eroded. One hopes that in future cases, our courts will reaffirm their commitment to the principles, such as deterrence, that animate fiduciary law—not only when fiduciaries have benefitted from a breach of those duties, but whenever a breach of fiduciary duty has been found, because there is value in requiring fiduciaries to keep up with their duties.

Relationship: Its Economic Character and Legal Consequences" (1991), 66 *N.Y.U. L. Rev.* 1045.