SUPREME COURT OF QUEENSLAND

CITATION:	*Pope v Madsen* [2015] QCA 36
PARTIES:	**DOUGLAS HAMILTON LOCKHART POPE** (applicant) **v** **SARA MADSEN** (respondent) **EVA ULRIKA KERR** (not a party to the application)
FILE NO/S:	Appeal No 3561 of 2014 DC No 2824 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	13 March 2015
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2014
JUDGES:	Holmes JA and Mullins and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. Set aside the orders below to the extent they apply to the proceeding between the respondent and the appellant.** **4. Instead, strike out the claim and statement of claim against the appellant.** **5. The respondent to pay the appellant's costs of the proceeding below and this application for leave to appeal and the appeal.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – FIDUCIARY OBLIGATIONS – PARTICULAR CASES – OTHER CASES – where respondent alleged continued physical and sexual abuse from applicant father during childhood – where respondent alleged abuse constitutes breach of fiduciary duty – where respondent seeks equitable compensation for breach of fiduciary duty – whether the respondent's claim can succeed under Australian law APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL

LIES – ERROR OF LAW – WHAT IS – GENERALLY – where primary judge refused to strike out, permanently stay or otherwise dismiss claim as disclosing no cause of action – where applicant seeks leave to appeal against decision of primary judge – where the current state of the Australian law does not recognise the right of the respondent to bring a claim for equitable compensation for breach of fiduciary duty alleged by the respondent against a parent based on physical and sexual abuse – whether the matter should proceed to trial

District Court of Queensland Act 1967 (Qld), s 118

Breen v Williams (1996) 186 CLR 71; [1996] HCA 57, followed
Cubillo v Commonwealth (2001) 112 FCR 455; [2001] FCA 1213, followed
J v J [2014] NZCA 445, considered
Paramasivam v Flynn (1998) 90 FCR 489; [1998] FCA 1711, followed
Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd & Anor [2011] QCA 102, considered
Secretary, Department of Health and Community Services v JWB and SMB (*Marion's Case*) (1992) 175 CLR 218; [1992] HCA 15, considered
Tusyn v State of Tasmania (2004) 13 Tas R 51; [2004] TASSC 50, considered
Woodhead v Elbourne [2001] 1 Qd R 220; [2000] QSC 42, considered

COUNSEL: A K Ehlers for the applicant
D R Kent QC, with S P Gray, for the respondent

SOLICITORS: Kerwin Solicitors for the applicant
Hatzis Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Mullins J and the orders she proposes.

[2] **MULLINS J:** The applicant seeks leave pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) to appeal the decision of the learned District Court judge who refused to strike out, stay permanently or otherwise dismiss the respondent's claim and statement of claim as not disclosing a cause of action known to Australian law: *Madsen v Pope & Anor* [2014] QDC 45 (the reasons).

[3] Apart from dismissing the applicant's strike out application, the primary judge gave leave to the respondent to amend the claim and statement of claim in accordance with the reasons (subject to the directions made on 28 March 2014).

The proceeding

[4] The respondent's claim, as originally filed, is for equitable damages and exemplary damages for breach of fiduciary duties against the applicant (who is her biological father) as the first defendant and against her biological mother as the second defendant. The second defendant is not a party to the application to this Court.

Although the second defendant also brought a strike out application that was dismissed by the primary judge, the second defendant has not sought leave to appeal the decision.

[5] The respondent's parents separated in 1986 when she was about eight years old and she continued to reside with the applicant. She alleges that the applicant owed her fiduciary duties including duties to care for her and protect her from harm, to act in her best interests in accordance with her long term needs, to secure her interests above his own needs, to ensure she had adequate support and supervision, to ensure that she was not exposed to inappropriate conduct whilst she was in the applicant's presence, and to exercise parental control over the respondent in such a way as not to cause her harm.

[6] The respondent alleges the applicant breached the fiduciary duties by the conduct that is particularised as occurring between 1977 and 1986 and then after 1986. In general terms, the respondent alleges that on many dates between 1977 and 1986 the applicant engaged in acts or conduct of a sexual nature which he knowingly allowed the respondent to witness. The conduct that is particularised as occurring after 1986 is much more extensive and includes allegations of inappropriate touching and kissing by the applicant of the respondent, allegations that the applicant indecently exposed himself to the respondent and allegations that the parental supervision exercised by the applicant amounted to harsh and oppressive conduct by frequently physically hitting and slapping the respondent, including using a leather belt on the respondent, subjecting the respondent to verbal and mental abuse, threatening to eject the respondent from the family home and neglecting the respondent's basic needs by failing to provide her with a safe and hygienic environment and adequate clothing.

[7] The respondent alleges that the second defendant owed her fiduciary duties of a similar nature to those particularised against the applicant and alleges that the second defendant breached the fiduciary duties by engaging in specified conduct particularised as occurring between 1977 and 1986 and then after 1986.

[8] The respondent alleges that as a result of the breaches of fiduciary duties by the applicant and the second defendant she has suffered loss and damage, including developing a major depressive disorder, chronic post traumatic stress disorder and bulimia nervosa, which has had an impact on her working capacity that is permanent and ongoing and caused her to require medical treatment. The applicant's defence alleges that the statement of claim discloses no cause of action at law.

The application before the primary judge

[9] The relevant issue agitated before the primary judge was whether the cause of action, as pleaded by the respondent, could as a matter of law succeed.

[10] The starting point in the reasons (at [8]) was the decision of the Court of Appeal in *Project Company No 2 Pty Ltd v Cushway Blackford & Associates Pty Ltd & Anor* [2011] QCA 102 at [27]-[30] from which the primary judge drew a number of propositions about what the approach should be to a claim where the law is uncertain or in a state of development:

> "… that where the law is uncertain, and especially where it is in a state of development, it is inappropriate to put a plaintiff out of court if there is a real issue to be tried, especially where, as in many actions (for example, based on negligence), the factual details may

> help to throw light on the existence of a legal cause of action; and that, unless it was possible to give a *certain* answer to the question whether the plaintiff's claim would succeed, the case is inappropriate for striking out, particularly in an area of law which is uncertain and developing, it being normally inappropriate to strike it out (because it is of great importance that such development should be on the basis of actual facts found at trial and not on hypothetical facts assumed – possibly wrongly – to be true for the purpose of the strikeout) … ."

[11] The primary judge then at [9] to [13] of the reasons referred to a number of authorities where courts had discussed actions based on a breach of fiduciary duty where the allegation had been the abuse of a relevant relationship by conduct, whether of commission or omission, involving sexual conduct or lack of care. The primary judge noted at [13] of the reasons that: "[n]either the first defendant nor the second defendant has brought to this Court's attention any case which directly involves a consideration of conduct such as alleged here, whether by commission or omission, involving direct conduct by a parent, or both parents, towards a child." The primary judge then referred to *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion's Case*) (1992) 175 CLR 218 and the statement of McHugh J at 317:

> "The powers which the parent exercises on behalf of the child are exercised in the course of a fiduciary relationship. At all events, the role of the parent, when acting for the benefit of his or her child, and the role of a fiduciary are sufficiently similar to make at least some of the principles concerning fiduciaries applicable to the parent-child relationship. Thus, in principle, a parent can have no authority to act on behalf of his or her child where a conflict arises between the interests of the parent and the interests of the child." (*footnote omitted*)

[12] The basis for the primary judge not concluding that the respondent's cause of action would not succeed, as a matter of law, is then explained in [13] of the reasons:

> "Although it can be immediately observed that *Marion's case* was concerned with the authority of a parent to act on 'behalf' of a child where a conflict might arise between the interests of the parents and the interests of the child, there is no binding decision on this Court which clearly shows that the causes of action relied upon here by the plaintiff are not arguable and, on that ground, ought to be struck out. In making that remark, I am mindful of the fact that it may well be thought to be likely that a court would, after a full hearing, come to a conclusion that no such causes of action were maintainable."

[13] The primary judge was satisfied that a claim for breach of fiduciary duty, if successful, would result in equitable compensation and not equitable damages and leave should be given to the respondent to amend the claim and the statement of claim to claim for equitable compensation rather than equitable damages. The primary judge ordered the applicant and the second defendant to pay the respondent's costs of the applications brought by the applicant and the second defendant to be fixed at 50 per cent of those costs and to be contributed equally by each of the applicant and the second defendant as to 50 per cent of that fixed percentage, to be assessed on the standard basis.

The issues

[14] The issue that is relied on by the applicant to seek leave to appeal and to succeed on the appeal is whether under Australian law a child who suffered personal injury (in

the nature of a psychiatric illness disorder) arising from sexual abuse or other abuse as a result of the conduct of the child's parents can maintain a claim of breach of fiduciary duty giving rise to equitable compensation against the child's parents.

[15] The applicant contends that the law of fiduciary obligations is not developing in relation to the subject matter of this proceeding and that Australian law does not permit a child to sue his or her parents for equitable compensation for breach of fiduciary duty when the child alleges he or she has suffered personal injury as a result of the abusive conduct of the parents.

[16] The respondent accepts that the issue as formulated by the applicant is raised in the proceeding, but submits that the issue to be decided on the leave application is whether there was any error in the primary judge's conclusion that it was an inappropriate case for summary judgment and the question of law should be determined at the trial of the proceeding rather than disposed of in a summary way.

[17] The application for leave to appeal therefore involves a substantive issue as to what is the current state of Australian law on a child suing his or her parents for equitable compensation for breach of fiduciary duty as a result of an injury sustained due to the abusive conduct of the parents. The second issue is a procedural issue that may depend on the determination of the substantive issue.

The relevant authorities

[18] It is therefore necessary to consider the authorities referred to the primary judge and on this application to ascertain the current state of Australian law on this topic.

[19] In *Breen v Williams* (1996) 186 CLR 71, one of the bases on which the patient sought access to her medical records from her treating doctor without having to incur the expense of a court application was that the patient/doctor relationship gave rise to a fiduciary duty to provide access. The members of the court were unanimous in rejecting the imposition of a fiduciary duty on the part of the doctor for this purpose and there is relevant discussion in the judgments on the nature and extent of fiduciary duty.

[20] Brennan CJ noted (at 82) that fiduciary duties arise from either agency or a relationship of ascendancy or influence by one party over another or dependence or trust on the part of that other and that, whatever the source of the duty:

> "… it is necessary to identify 'the subject matter over which the fiduciary obligations extend'. It is erroneous to regard the duty owed by a fiduciary to his beneficiary as attaching to every aspect of the fiduciary's conduct, however irrelevant that conduct may be to the agency or relationship that is the source of fiduciary duty." (*footnote omitted*)

Brennan CJ concluded (at 83) that, as between the doctor and the patient, there was no fiduciary relationship which gave rise to a duty to give access to or to permit the copying of the doctor's records, ie there was no relevant subject matter over which the doctor's fiduciary duty extended. Brennan CJ also considered (at 83) that the Canadian notion of fiduciary duty did not accord with the law of fiduciary duty as understood in Australia.

[21] Dawson and Toohey JJ stated at 93-94:

> "Equity requires that a person under a fiduciary obligation should not put himself or herself in a position where interest and duty conflict or, if conflict is unavoidable, should resolve it in favour of duty and, except by special arrangement, should not make a profit out of the position. The application of that requirement is quite inappropriate in the treatment of a patient by a doctor or in the giving of associated advice. There the duty of the doctor is established both in contract and in tort and it is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest. It has been observed that what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that. The concern of the law in a fiduciary relationship is not negligence or breach of contract. Yet it is the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations. Of course, fiduciary duties may be superimposed upon contractual obligations and it is conceivable that a doctor may place himself in a position with potential for a conflict of interest - if, for example, the doctor has a financial interest in a hospital or a pathology laboratory - so as to give rise to fiduciary obligations. But that is not this case." (*footnotes omitted*)

[22] Gaudron and McHugh JJ stated at 112-113:

> "Thirdly, the Canadian law on fiduciary duties is very different from the law of this country with respect to that subject. One commentator has recently pointed to the 'vast differences between Australia and Canada in understanding of the nature of fiduciary obligations'. One significant difference is the tendency of Canadian courts to apply fiduciary principles in an expansive manner so as to supplement tort law and provide a basis for the creation of new forms of civil wrongs. The Canadian cases also reveal a tendency to view fiduciary obligations as both proscriptive and prescriptive. However, Australian courts only recognise proscriptive fiduciary duties. This is not the place to explore the differences between the law of Canada and the law of Australia on this topic. With great respect to the Canadian courts, however, many cases in that jurisdiction pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their application to those relationships. Further, many of the Canadian cases pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often gives rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies.
>
> In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the

> person to whom the duty is owed. If there was a general fiduciary duty to act in the best interests of the patient, it would necessarily follow that a doctor has a duty to inform the patient that he or she has breached their contract or has been guilty of negligence in dealings with the patient. That is not the law of this country."
> (*footnotes omitted*)

[23] Gummow J observed at 137-138:

> "Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty."

[24] The High Court in *Breen* therefore preserved the established position in relation to fiduciary duty and that merely because parties may be in the type of relationship where fiduciary duties are imposed does not mean that all aspects of their relationship are subject to the imposition of fiduciary obligations. The term "fiduciary" may be applied to the relationship of a parent and child in some circumstances, but the existence of a fiduciary duty that is enforceable by way of equitable remedies depends on the application of the settled established principles as to the circumstances when fiduciary obligations are imposed. The dictum of McHugh J in *Marion's Case* at 317 was concerned with the exercise of the authority of a parent to permit the sterilisation of a child. It cannot displace the reasoning in *Breen* that limits the circumstances where it is appropriate to analyse the conduct of a party to a relationship in terms of breach of fiduciary duty.

[25] The Full Court of the Federal Court in *Paramasivam v Flynn* (1998) 90 FCR 489 dismissed an appeal from Gallop J who dismissed an application by the plaintiff for an extension of time in which to sue the defendant for breach of fiduciary duty in respect of alleged assaults in the nature of sexual abuse committed when the plaintiff was under the care of the defendant and then when the defendant became the plaintiff's guardian in 1981 (when the plaintiff was 16 years old). One of the factors that Gallop J considered in relation to an extension of the limitation period was the strength of the plaintiff's case. Based on the facts alleged by the plaintiff in his affidavit, Gallop J concluded that there were no real prospects of success in the claim for breach of fiduciary duty.

[26] The court noted at 505:

> "Of course, conduct such as that alleged against the respondent in this case can readily be described in terms of abuse of a position of trust or confidence, or even in terms of the undertaking of a role which may in some respects be representative and, within the scope of that role, allowing personal interest (in the form of self gratification) to displace a duty to protect the appellant's interests. But it should not be concluded, simply because the allegations can be described in those terms, that the appellant should succeed in an action for breach of fiduciary duty if the allegations are made good."

[27] After noting the rejection by the High Court in *Breen* of the Canadian approach to the development of the law relating to fiduciaries, the court concluded at 507-508:

> "All those considerations lead us firmly to the conclusion that a fiduciary claim, such as that made by the plaintiff in this case, is most unlikely to be upheld by Australian courts. Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles. The truth of that is not at all undermined by the undoubted fact that fiduciary duties may arise within a relationship governed by contract or that liability in equity may co-exist with liability in tort. To say, truly, that categories are not closed does not justify so radical a departure from underlying principle. Those propositions, in our view, lie at the heart of the High Court authorities to which we have referred, particularly, perhaps, *Breen*. It follows that Gallop J was justified in concluding that he was not persuaded that the appellant's claim based on breaches of fiduciary duty owed by the respondent to the appellant had real prospects of success."

[28] The plaintiff in *Woodhead v Elbourne* [2001] 1 Qd R 220 alleged that the defendant who was a friend of her adoptive parents assaulted her in a sexual way on a number of occasions when she was a child and sought damages for alleged psychiatric and subsequent economic consequences of those assaults. White J struck out the plaintiff's claim against the defendant, insofar as it was based on a breach of fiduciary duty, on the basis that there was no alleged fact which could support such a relationship. White J's conclusion at [34] from the analysis of the authorities was that there is a clear trend of the Australian authorities against extending the law relating to fiduciaries to protect other than economic interests where those interests embraced the relationship of parent and child or ward/guardian.

[29] The appellants in *Cubillo v Commonwealth* (2001) 112 FCR 455 were part-Aboriginal people, each of whom had been removed from his or her Aboriginal family as a child on the authorisation of the Director of Native Affairs under Northern Territory legislation. They brought proceedings against the Commonwealth alleging false imprisonment, breach of statutory duty, negligence and breach of fiduciary duty. They were unsuccessful before the primary judge and their appeal was dismissed by the Full Court of the Federal Court. The appellants' case alleged breaches of fiduciary duty against the Commonwealth that were largely coextensive with the alleged breaches of the Commonwealth's duty of care. On the basis of statements made by the High Court in *Breen* at 93, 110 and 113 and *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [71], the court stated at [466]:

> "As the High Court has held, there is no room for the superimposition of fiduciary duties on common law duties simply to improve the nature and extent of the remedies available to an aggrieved party. If it had been the case that the removal and detention of the appellants were not authorised by the Ordinances (or otherwise justified by law), those who caused the removal or detention would be guilty of tortious conduct and liable at common law. There would be no occasion to invoke fiduciary principles."

[30] In *Tusyn v State of Tasmania* (2004) 13 Tas R 51, Mr Tusyn brought an action against the State of Tasmania on the basis of negligence and breach of fiduciary

duty in respect of alleged incidents of sexual abuse and resulting PTSD that occurred in 1961 when he was a ward of the State. The defendant was successful in having those parts of the statement of claim based on a breach of fiduciary duty struck out by Blow J. Blow J at [28] considered that he should follow the decisions in *Paramasivam* and *Cubillo* and noted that the Canadian approach to the detection of fiduciary duties "involves too great a departure from established principles for any other course to be appropriate".

[31] As in Canada, New Zealand courts have been prepared to extend fiduciary obligations to parental and quasi-parental relationships where the claim for breach of the fiduciary obligation by a child is based on sexual abuse, but the departure of the New Zealand jurisprudence from the Australian approach was noted in *J v J* [2014] NZCA 445 at [64]-[70].

[32] The respondent submits that none of these authorities relied on by the applicant concern directly the relationship of parent and child. It is submitted that *Paramasivam* and *Cubillo* can be distinguished on the facts as the relationship between the parties in each case was not parent and child and the consideration of whether such authorities represent the law to be applied where the relationship is parent and child (as in the respondent's claim) should be decided in the light of all the evidence adduced at the trial of this matter. The problem for the respondent is that the statements of principle in *Breen*, *Paramasivam* and *Cubillo* are equally applicable where a plaintiff seeks to hold a parent liable for equitable compensation for personal injury suffered as a result of breach of fiduciary duty involving sexual and like abuse which is the usual domain of a claim for damages of personal injury.

[33] The primary judge at [13] of the reasons did consider it likely on the basis of the authorities that a court would, after a full hearing of the respondent's claim based on breach of fiduciary duty, conclude that such a cause of action could not succeed. In light of the principled basis on which the High Court in *Breen* distinguished the Canadian approach to the imposition of a fiduciary duty to vindicate non-economic interests that are covered by the law of tort, its application in *Paramasivam* and *Cubillo*, and with no signs otherwise of it being an evolving area of the law, the current state of the Australian law can be expressed definitively in terms that the respondent has no maintainable cause of action against the applicant for breach of fiduciary duty on the basis of the pleaded facts.

[34] That conclusion means the determination of the procedural issue as to whether or not it was inappropriate to determine the substantive issue summarily must have a different result. There is no point in waiting for a trial before applying the law that does not support the existence of the cause of action pleaded by the respondent based on breach of fiduciary duty.

Orders

[35] The substantive issue raised by the application involves an important principle of law and it is in the interests of justice that the matter be resolved at this stage of the proceeding, rather than allow the claim against the applicant that is doomed to fail to proceed to trial. The interests of justice require the granting of the application for leave to appeal and the appeal must be allowed.

[36] If the respondent's allegations were being dealt with in the criminal jurisdiction of the court, the parties' names would not have been disclosed. As the allegations are

made in a civil claim, there is no requirement for the parties' names to be suppressed. It is always for a trial judge to decide whether the sensitivities of the allegations warrant the exercise of the discretion to suppress the parties' names. I may have been inclined to exercise the discretion in favour of not disclosing the names of the parties in the publication of any reasons, if I had been making that decision at first instance, by analogy with the position that would have applied if the allegations were being considered in a criminal matter. As that was not done in the reasons of the primary judge, there is no point in considering now whether to suppress the names of the parties in the publication of these reasons. In fact, it is only fair that a reader of the reasons of the primary judge is able to ascertain the outcome of the appeal.

[37] The following orders should be made:

1. Application for leave to appeal granted.
2. Appeal allowed.
3. Set aside the orders below to the extent they apply to the proceeding between the respondent and the appellant.
4. Instead, strike out the claim and statement of claim against the appellant.
5. The respondent to pay the appellant's costs of the proceeding below and this application for leave to appeal and the appeal.

[38] **HENRY J:** I agree with the reasons of Mullins J and the orders she proposes.