

Parental fiduciary duty: the minority decision in *D v A*

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My last article was on the Court of Appeal's decision in *D v A* [2022] NZCA 430. Can a child sue a parent for a breach of fiduciary duty?

The court held, by a majority of two to one, that a father who had repeatedly raped his daughter and destroyed her life was not acting in breach of fiduciary duty when, 30 years after she left home, he disposed of all his assets so she couldn't sue his estate after he died.

Collins J dissented. He described the state of the daughter more than 30 years after she left home with these words:

"[she] has struggled to find accommodation... occasionally, she has been forced to live in her car. She has had no fixed abode or permanent work ... [she] said she continues to live in poverty and that she suffers from poor health associated with post-traumatic stress disorder." [22]

Kós P and Gilbert J held that the father's fiduciary duties to the child ceased when she became an adult.

Several readers have contacted me about the case to say they disagree with the majority's decision. Because the decision has a number of novel aspects, I am writing a little more about it.

My first observation is that it appears to be agreed that a parent owes fiduciary duties to a child under the age of 20.

Kós P described the nature of the fiduciary duty as being "to refrain from acts that fundamentally violate the relationship of trust inherent in a parent-child relationship. Foremost within a duty expressed in such terms is to refrain from sexually and physically abusing the child".

It appears that if the daughter, having left home, had sued the father within the time allowed under the Limitation Act, she would have had a good cause of action. Her claim would have been for exemplary

damages arising from physical and/or mental injuries she suffered, since such claims are not prevented by the accident compensation regime: see the Supreme Court's decision in *Couch v Attorney-General (No 2)* [2010] 3 NZLR 149.

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Collins J held that the father's fiduciary duty to the daughter "continue[d] after the child became an adult." He gave the example of a "severely disabled child who is dependent on their parents for care and support..." [79] and held by the same form of reasoning that the father in *D v A* owed a continuing duty to the daughter during the 30 years that passed after she left home and when he gave away his assets to defeat any claim she might make against his estate.

He held that the father owed fiduciary duties to the daughter "throughout her adult life" [102]. By contrast, Kós P and Gilbert J held that the father's fiduciary duty "ceased when he no longer lived with, or cared for, the children". [152]

Although Gilbert J said the harm the father had caused the daughter was "incalculable" and "ongoing" [121], he said her claim was statute-barred by the time the father gifted his assets to a trust [138]. In saying this he added that "no such fiduciary relationship or fiduciary duty has been recognised in Australia or in England" [136].

The daughter's decision not to communicate with her father for 30 years was said to be a barrier that stood against her.

But when a father has caused his child "incalculable and ongoing harm", it is understandable that she will not want to communicate with him and it seems harsh

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to criticise her for avoiding contact.

The Court of Appeal's decision is notable for the strength of the division between Collins J and Gilbert J. Amongst other things, Gilbert J described Collins J's decision as "unprincipled". [122]

A decision that has no precedent can be described as "unprincipled" but when that decision is caused by

the "incalculable and ongoing harm" that Gilbert J says a parent has inflicted on his child and which has destroyed her life, many will say it's time for the law to change.

La Forest J of the Canadian Supreme Court has said, "it is intuitively apparent that ... the sexual assault of one's child is a grievous breach of the [fiduciary] obligations arising from that relationship The act of incest is a heinous violation of that obligation".

The consequences of such actions should not be curtailed by the Limitation Act since many victims of such attacks will be traumatised, poor and have no resources or skills to engage in litigation. The law should construct a way for a cause of action to be perpetuated to provide meaningful recourse for the victims of such acts. Collins J has showed what one such path might be.

Not only would such a cause of action provide a form of redress for terrible actions but it might also, in a small way, act as a deterrent to some parents who think they can get away with such actions with impunity.

The fact that neither England nor Australia has recognised such a claim is not a good reason for New Zealand not to do so. Our judges should have the confidence to make new law where the principles of justice require it. ■

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