Legal Liability of Travel Agents: Are they Agents at all?

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I: INTRODUCTION

If a layperson was asked to define the legal relationship between consumer and travel agent, he or she would probably assume that a contractual relationship exists between the two parties. It might come as a surprise to most people to learn that the consumer's "contract" is in fact with the supplier, such as the hotel or airline, rather than the travel agent. That is, at least, what most commercial lawyers would say. It is presumed by members of the travel industry and the legal profession that the tripartite relationship between travel agent, supplier and travel consumer is governed by principles of agency law; namely, that the travel agent is expressly or impliedly authorised to sell the supplier's product to consumers, thereby having the power to bind the latter parties in contract. The primary feature of an agency relationship is its fiduciary status, and the obligations incumbent on a fiduciary are extensive.

In this paper, I intend to oppugn the accuracy of applying agency law as a blanket rule to travel agency transactions. The feature that is so fundamental to the existence of agency, namely the observance of fiduciary duties, is conspicuously absent from the relationship between travel agent and principal. Foremost amongst these fiduciary duties is the duty on an agent to act bona fide in the interests of its principal and not to allow its interests to conflict with its duties to the principal. The whole function and purpose of a travel agent, however, is to choose, on behalf of its client, between a host of different travel and tourism providers. The ultimate choice may come down to a range of factors: location, price, personal experience, recommendation, or higher commission for the agent. Whatever the reason for choosing one supplier over another, the fiduciary duties would appear to be compromised on many occasions.[1]

The following sections illustrate why it is not propitious to hold a travel agent in a fiduciary relationship with the vast array of hotels, rental car companies and sight-seeing operators it deals with all over the world. There is no reason to treat the travel agent differently from any other retailer or service provider contracting directly with members of the public. It is preferable, and eminently more realistic, to regard the

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1 Admittedly, fiduciary duties are capable of being modified by agreement or custom, but this writer queries whether this can be done to the extent of rendering them practically nonexistent.

legal relationship between consumer, travel agent, and supplier as a series of contractual relations. The travel agent would thus be described as an independent contractor or intermediary rather than a fiduciary.

It is important to qualify the scope of my proposition that agency law is not the correct legal basis of the travel agency relationship. It would be incorrect to suggest that agency does not occur under any circumstances between the parties. A travel agent may be considered an agent for the purposes of receiving and communicating an offer, or for receiving and forwarding payment to the supplier. A travel agent may only issue a ticket on an airline's behalf if it is authorised to hold that airline's "plate".[2] There are particular aspects of a travel agency business that favour an agency construction, but it is submitted that to characterise the overall legal relationship as one of general agency is not correct.[3]

I shall first give an overview of how the travel industry functions, the types of legal issues that arise, and the possible reasons why there is confusion in this area. In the third section I detail a few of the travel cases that purport to define liability in travel relationships. It will be seen that in most cases, the precise nature of the relationship is avoided altogether and there is no discussion on the fiduciary obligations that would normally apply. The next section provides a description of the fiduciary duties common to most agency relationships, followed by an analysis of why these duties do not seem to fit in a travel context. Finally, I suggest an alternative approach that is simpler, ascertainable, and considerably more realistic – contract law principles. Instead of fiduciary obligations, the appropriate standard should be, as with any service contract, an implied term in the travel contract to act with due care and skill to the standard of the reasonable travel agent. A contractual framework is far more in tune with commercial reality and brings travel agents in line with other service providers.

II: LEGAL LIABILITY ARISING IN TRAVEL

At first glance, it may be difficult to see how issues of legal liability in a travel context should be different from any other service transaction. The idiosyncrasies of the travel industry, however, can turn a seemingly simple transaction into a legal

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2 Plates are metallic discs that International Air Transport Association ("IATA") airlines give to travel agents so that tickets can be issued on behalf of the individual carriers. If a travel agent is in default of its obligations as a member of Travel Agents Association New Zealand ("TAANZ"), the plates will be withdrawn and it will not be able to issue airline tickets.

3 In some respects, the issue has been overshadowed by the advent of comprehensive legislation that provides consumers with administratively "simpler" ways of obtaining access to justice. Many situations will now fall within the scope of the Consumer Guarantees Act 1993 or the Fair Trading Act 1986. These statutes apply to the travel industry as much as any other service provider, and these days they are probably the primary mechanism in legal proceedings where clients have a grievance against travel agents. It is still important, nonetheless, to identify and understand the legal nature of the relationship upon which travel agent liability is based. The applicable consumer statutes in force are widely resorted to, but they are not codes, and therefore the common law continues to apply.

labyrinth. Two principal factors contribute to the uncertainty: the unique nature of the travel industry and the lack of clarity in the legal principles that govern this area. There seems to be confusion about the precise nature and scope of the legal relationships that exist between industry participants *inter se* and with consumers.[4]

1. The Unique Nature of the Travel Industry

The number of people involved in a person's holiday is probably greater than most would suspect, and identifying the individual or organisation to be held accountable is not always straightforward. The tourism industry comprises a potentially vast number of participants. In nearly every destination throughout the world there are airlines, buses, trains, hotels, youth hostels, caterers, and other tourism providers. A person may encounter most of these operators during his or her trip, and the potential for things to go wrong increases as more people become involved.

In a simple transaction, a consumer may make his or her reservations direct with suppliers. Should the need for legal action arise, the choice of defendant may not be too difficult. The same cannot be said, however, for the vast majority of travel transactions. Potentially all of the distribution levels might be involved in a single transaction, and the network of relationships can thus become extremely complicated. Each of the intermediary parties will deduct a commission, and each of them is legally liable to some extent if the transaction breaks down. Atherton states that:[5]

> The package holiday product is synthetic: it involves a multitude of components and suppliers in different locations making it difficult for tour operators to coordinate and control the composite product so that the desired holiday experience is delivered. This is compounded by the fact that each component is also usually marketed as a "stand alone" product so that suppliers are independent of the tour operator. If something goes wrong it may also be difficult for consumers and any other innocent parties involved to identify who is legally liable. It can be seen that there are numerous contracts involved, sometimes dealing directly, sometimes indirectly with the others.

The difficulty in determining legal liability in any given situation may be complicated further by the intangible nature of the travel product itself. Typically,

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4 The sales distribution chain can be divided into four main categories. At the first level, there are *suppliers* such as airlines, shipping companies, railroads, car rental agencies, bus lines, sightseeing companies, and hotels. These suppliers provide the components of the 'travel product' that are marketed directly to consumers, or through various intermediaries. The intermediaries are the second level in the distribution chain, consisting primarily of *wholesalers* and *tour operators*. Wholesalers can sell airfares or accommodation individually, or as a package. Tour operators put together packages of airfares, accommodation, transfers, and other options such as sightseeing tours. Next are the retail *travel agents* at level three, whose function it is to procure the services of the suppliers directly, or via one of the intermediaries mentioned above. The final level of the sales distribution chain is the *consumer*.

5 "Package Holidays: tourist's trial buy or deal becomes operator's trial by ordeal" (1993) 1 Current Commercial Law 100.

when a consumer books a vacation, he or she is not just purchasing a product, but rather an experience. The outcome may be one of the most positive or the most negative experiences that a person can have. Often the client has not travelled to the particular destination before, and in many cases they may not have travelled at all. People therefore build up expectations about the experiences they will have. It could be the holiday of a lifetime, a stress release, or the romantic experience they have always dreamed of. If something minor goes wrong, it will probably grow out of all proportion if the holiday does not live up to the traveller's expectations. Middleton comments that:[6]

> In practice, the ability to "engineer" intangible service products on paper and to promise satisfaction in brochures and in advertising, often exceeds a destination's or a producer's ability to deliver the satisfaction at the time of consumption. Because tourist products are ideas at the time of purchase, it is relatively easy to oversell such products.

It will not always be a simple exercise to allocate responsibility for a traveller's disappointment. Did the travel agent misrepresent the true situation? Was the picture in the wholesaler's brochure misleading? Did the hotel not advise its sales agents that construction work would be taking place that month? Or were the consumer's expectations simply unrealistic?

Legal liability may also be in question in other situations, due to the advice given (or lack thereof) by the travel agent about documentation requirements or destinational information. There may be disputes about the restrictions imposed by transportation companies on dates of travel or conditions of carriage. A common occurrence is the failure by tour operators to provide the components of a holiday package to the satisfaction of the traveller.[7] For example, the hotel may be full on arrival, or the amenities may not live up to the glowing rhetoric of the travel brochure. Travel insurance policies, cancellation fees and refunds may also give rise to disputes.

In any of the above situations, a disgruntled traveller may be inclined to pursue the matter further and seek a legal remedy. He or she is then confronted with the prospect of litigation and the prevailing uncertainty in this area of law. Judicial authority is not particularly helpful in defining a consumer's rights against travel agents and travel wholesalers.[8] Typical agency analysis would hold the principal liable for the contract's performance, but who is the principal in any particular transaction? Is it the travel agent contracting directly with the consumer? Is it the

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6 Middleton, *Marketing in Travel and Tourism* (1985) 78.

7 Heilbronn, *Travel and Tourism Law in Australia and New Zealand* (1992) 186-187. Heilbronn defines a tour operator as follows:

> The term "tour operator" is not a legal "term of art" but a simple description of the type of business which a person or corporation is engaged in, viz the creation, organisation, sale and management of tours, including the "package holiday" ... "dedicated" tour operators only "construct" and operate tours ... often specialising in certain destinations. Their product is the "package" though sometimes they own basic travel services such as hotels.

8 This is discussed in depth in section III.

tour operator who puts together and sells the package via the travel agent? Or is it the supplier who provides the actual product at the end of the day? What of the fiduciary obligations that are inherent in an agency relationship? All of the travel eventualities described above can have very serious consequences of their own, so it is not surprising that the underlying debate about agency aalysis is usually pushed to one side. Unfortunately, cases therefore proceed based on assumptions, and the analytical reasoning behind these assumptions is seldom revealed.

2. Legal Principles

The combination of all these factors can therefore render the determination of liability a complicated exercise. In addition to the logistical and inherent problems associated with the travel experience, there is a lack of clarity in the law over the fundamental basis of liability. One prominent writer has stated that there is "considerable confusion in respect of the important legal principles that apply to the many facets of the travel transaction".[9] He identifies two broad problem areas that contribute to this:

(a) The disproportionate expense of litigation to the damages awarded means that few disputes make it to superior court level.[10] The prospects of a useful jurisprudence in this area are, therefore, regrettably meagre.
(b) The diverse sources of law.[11] For example:[12]

   (i) Relevant principles of contract, agency and tort law;
   (ii) Consumer legislation such as the Fair Trading Act 1986 and the Consumer Guarantees Act 1993;
   (iii) Quasi-legal sources such as TAANZ[13] and IATA[14] codes of ethics and other guides to air travel reservations and ticketing, advertising, hotel and travel agency relations;

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9 Heilbronn, "Procedures for Pursuing Travel Consumer Claims: Alternatives for Resolving Disputes Arising from the Travel Transaction" (1998) International Travel Law Journal 37.

10 Heilbronn quotes the revered case of *Jarvis v Swan Tours Ltd* [1972] WLR 954, where Mr Jarvis was awarded £125 damages when his £63 two-week holiday in Switzerland failed to provide him with the features that the tour operator claimed it would.

11 The quoted "sources of law" that Heilbronn provides are effectively a combination of legal and regulatory mechanisms that govern the overall behaviour and activities of travel industry participants.

12 I have modified this list to represent a New Zealand perspective instead of an Australian one.

13 The Travel Agents' Association of New Zealand is a self regulating trade association representing 95 percent of all travel agents in New Zealand. The criteria for full membership of TAANZ, and hence its Bonding scheme, are quite comprehensive and include minimum education levels for staff and financial security.

14 The International Air Transport Association is an association of airlines concerned with the development and regulation of the air transportation industry. Membership of IATA is open to any member of the UN and comprises approximately 80 per cent of the world's international airlines.

(iv) TAANZ bonding scheme for travellers when travel agents become insolvent;[15]
(v) International law: for example, the air carrier liability limitation provisions of the 1929 Warsaw Convention; the Athens' Convention relating to the carriage of passengers and luggage by sea of 1974, and its 1976 Protocol; the International Hotel Regulations;
(vi) Legislation such as the Carriage By Air Act 1967, and the Civil Aviation Act 1990;
(vii) Inter-industry agreements such as TAANZ/MANZ;[16] and
(viii) International industry regulatory measures and practice codes including IATA resolutions and agreements setting out rights and obligations of airlines and travel agents *inter se*, as well as procedures and principles for dispute resolution.

The result of both these factors is that the opportunity for exposition and clarity in this area of law seldom arises.[17] The complex regime of industry agreements and bonding schemes is effective to stifle litigation because it is procedurally faster, cheaper, and less public. If cases do get to court, they are often dealt with under user-friendly consumer legislation such as the Consumer Guarantees Act 1993 ("CGA") or the Fair Trading Act 1986 ("FTA").

However, the need for legal clarification in this area still exists in today's commercial environment. The CGA, for example, presupposes a contractual relationship. If agency theory does apply, then its rules dictate that the consumer's contract is with the principal and not the agent. Deciding who the principal is in a particular transaction has proved to be a controversial issue, and the travel cases to date seem to have caused more confusion than they have solved. In local cases against travel agents, the courts might have difficulty reconciling the CGA with typical agency analysis that absolves the agent from liability. The relative youth of the CGA and the availability of alternative procedures have unfortunately provided little scope for further discussion of these points.[18]

With this multifarious overlay of regulatory and legal standards, even the travel industry itself manages to fumble along without satisfactorily defining the legal obligations of its members. As a corollary, the public remains in the dark as to the

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15 The scheme is designed to provide a guarantee (within prescribed limits) that the public will be protected in dealing directly with members of TAANZ in the event of financial collapse of any of its members.

16 The Motel Association of New Zealand is the national trade body for the motel industry. MANZ has a membership of approximately 73 percent of the motels in New Zealand. It works closely with TAANZ to provide a booking service for travellers.

17 Disputes with travel agents and wholesalers are increasingly being dealt with at Disputes Tribunal hearings. The cost of taking a case is more commensurate to the amount of damages likely to be awarded.

18 One other important restriction to note on statutory application generally is the territorial nature of legislation where foreign parties are involved, which will often be the situation with travel cases.

legal basis that underpins its relationship with travel industry members. Heilbronn believes that the precise obligations of travel agents and tour operators upon which claims by consumers (or suppliers) may be based, are either unknown or not properly understood by potential claimants or even by the travel service providers themselves.[19]

Finally, the remoteness of damage may also be difficult to determine in travel cases. As there may be numerous participants in a travel transaction, it is necessary to establish what would have been in the reasonable contemplation of the liable party. There can be so many consequences of a holiday going wrong that judges have to be very careful in determining the extent of liability. In many cases the injured party may have both a restitutionary and an expectation interest,[20] the quantification of the latter being the most difficult to assess. The heads of damage have also expanded in recent years to include damages for disappointment and distress, and travel cases have been the primary recipient in this regard.[21]

III: APPLICATION OF AGENCY LAW TO TRAVEL AGENTS

In the second section we learned that resolving issues of legal liability within the travel industry can be a rather complicated exercise. If we strip away the blanket of consumer legislation and industry regulations, the question remains as to what the true legal basis of the relationship between consumer, travel agent, and supplier is. Typically, the answer is considered to be agency. The problem, however, is that there is usually little or no discussion as to why this should be so, and in most cases agency is simply assumed. The present section will examine some of the case law and academic opinion that purports to define liability in travel relationships.

Generally an agent does not make a contract for himself or herself; rather, the legal analysis insists that the principal is the party to the contract with the consumer. Hence, the principal and not the agent incurs contractual responsibility for its performance. When a principal endows an agent with authority to contract on its behalf, it is bound in respect of third parties by all acts of the agent that are done within the limits of that authority. This is so even if the agent has acted for its own benefit and in fraud of its principal. The prima facie rule, therefore, is that if the contract is made for a named principal, then the principal *alone* can sue or be sued.[22]

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19 Supra note 9.

20 The right to compensation for the loss of the bargain, the object being to financially restore the innocent party to the position which he or she would have occupied had the contract been performed.

21 For example, *Baltic Shipping Co v Dillon (the "Mikhail Lermontov")* (1991) 22 NSWLR 1; *Jarvis v Swan Tours Ltd* [1973] QB 233.

22 This is a rebuttable presumption, however, and it is the intention of the parties in the particular circumstances that will be decisive.

1. Case Law and Industry Experts

It is a well-known principle of agency law that the title "agent" is not of itself determinative. Wohlmuth states:[23]

> Courts will not be controlled in the determination of the existence of agency by the presence or absence of the label or even by the belief of the parties that they have or have not created the relationship. Agency is found to exist where the agreement results in a factual relationship containing the elements of agency.

It is unfortunate that this fundamental principle does not seem to have prevailed in much of the case law to date. In *Rosen v DePorter-Butterworth Tours Inc*,[24] the plaintiff sued his travel agent for breach of agreement because it failed to notify the tour operator of his whereabouts in case of changes to the tour. The majority found in favour of the plaintiff traveller, based on the following:

> The traditional relationship between a travel bureau ... and the tour sponsors of the various tours sold has been categorized as one of agent and principal .... [S]everal out-of-state courts have readily recognized a principal-agent relationship between the tour sponsors and travel bureaus, and accordingly found liability for the breach in favour of the traveler .... [W]e believe [the] defendant acted negligently in violation of his duties under his agency agreement with the plaintiff to arrange this particular tour.

The majority held that the plaintiff had employed the defendant travel agent as his special agent for the limited purpose of arranging the tour, and the agent was therefore liable under the agency agreement. The majority did not question whether agency was the correct foundation of the relationship, and in fact went on to add that the travel agent might be acting as an agent for the tour operator at the same time. It based its reasoning on: an acknowledgment by the defendant, to the tour operator, that it sold a tour to the plaintiff; and the fact that the defendant received a ten percent commission from the operator for selling the tour. This was sufficient evidence for there to be a "hint of a principal-agency relationship" and the majority held "[t]he instant situation becomes particularly sensitive for the defendant with the strong possibility that he is acting in a dual agency capacity with inherent conflicting interests".[25] The travel agent was also found to be directly liable to the plaintiff as principal because it had not adequately disclosed the identity of the principal, World Trek. This was so despite the fact that the plaintiff knew that World Trek, and not the defendant, was the tour sponsor.

The finding raises serious concerns about the functions of a travel agent generally. The very nature of the business is to act as a middle-person in bringing together

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23 Wohlmuth, "The Liability of Travel Agents: A Study in the Selection of Appropriate Legal Principles" (1966) 40 TLQ 38.

24 (1978) 379 NE 2d 407, 410, 411.

25 Ibid 410.

clients and suppliers, so it seems anomalous to ascribe liability based on inherent conflicting interests. The dissenting judgment of Stouder J is, with respect, more convincing, as it denies an agency construction altogether. It can be summarised as follows:

(a) the fact that the tour operator pays the agent commission of 10 percent is not enough to show the existence of an agency relationship;
(b) prior to the time the client brought the brochure to the travel agent, the travel agent had no contact with World Trek (the tour operator) and certainly no permanent association with it sufficient to imply an agency relationship;
(c) the travel agent never solicited or promoted the World Trek tour and booked it solely upon the client's request;
(d) the authorities referred to by the majority assumed that the agent was the agent for the supplier without discussing the applicable principles of agency;[26] and
(e) the agency argument had not even been advanced by the plaintiff, and because they were not dealing with "an area of law which has been extensively reported and therefore the defendant's duties as a special agent ... are not well defined", the judge thought it was inappropriate for the court to uphold the defendant's liability based upon this theory of recovery.

In *Dorkin v American Express Company,*[27] Mahoney J had to consider the possibility of American Express Travel being an agent of the various hotels and transportation companies abroad, after its client sustained injuries when a tour bus braked abruptly. His Honour based his reasoning on principles of agency law, concluding that, in the absence of agreement or acts that indicated the contracting parties' intention to impose responsibility on the agent, the agent was not responsible for either a tortious act or a breach of contract by its principal. The judge did not discuss the applicability of the relevant principles of agency law.

The court was a little more helpful in *Simpson v Compagnie Nationale Air France,*[28] explaining how there could be no agency relationship between the travel agency and the airline. The plaintiff client paid money to a travel agency for a ticket on Air France, but shortly afterwards the travel agent filed a voluntary petition in bankruptcy. The plaintiff brought an action against the airline claiming that the travel agent was acting as the agent of Air France and that Air France should be liable for the acts or defalcations of its agent. The court found that the travel agent was not in an agency relationship with the airline because of the absence of a duty of loyalty. It thought that if the travel agent were truly the agent of Air France, then the airline could demand damages for *any* failure of the agent to act in its best interests. The travel agent could not possibly be held liable to Air France if it booked passage on one of the other competing carriers.

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[26] *McQuade (EA) Travel Agency Inc v Domeck* (1966) 190 So 2d 3; *Unger v Travel Arrangements Inc* (1966) 25 AD 2d 40, 266 NYS 2d 715.
[27] (1974) 351 NYS 2d 190.
[28] (1969) 42 Ill 2d 196, 248 NE 2d 117, 119-120.

This part of the analysis seems sound, but the court then went on to hold that the travel agent was actually a broker for the plaintiff traveller, as it had arranged other trips for the client in the past. There was little discussion as to what being a broker involves and what obligations this role would entail.

In *Cameron v Qantas Airways Limited*,[29] the majority assumed that an agency relationship exists between travel agents and airlines for limited purposes, stating "in some areas, the respondent has expressly nominated some agents as having its authority to receive, and pass on, information and this would be something done 'on behalf of the respondent'". It was held that express authority was given to agents via printed airline timetables that instructed people to make their reservations through approved travel agents and advise those agents about any issues, such as special dietary requirements, and so on.

The recent case of *LC Fowler & Sons v St Stephens College Board of Governors* is an interesting application of agency law in New Zealand.[30] The school arranged for two rugby teams and their supporters to tour a number of countries in Europe. The plaintiff, "Gullivers", was a tour operator based in England who specialised in arranging sporting tours. The school used the services of a Mr Murray, to whom they paid an initial amount of £20,000, followed by another £29,585.[31] Mr Murray forwarded the initial amount to Gullivers, but misappropriated the balance and absconded to Australia. Gullivers sued the school for the balance of £29,585. The issue to be determined was whether Mr Murray was acting as agent for the school or for Gullivers. In his analysis of agency theory, Thomas J stated:[32]

> Whether or not the relationship exists in any given situation depends not on the terminology employed so much as the true nature of the arrangement or the exact circumstances of the relationship. The essence, to my mind, of the agent's position is that he or she is only an intermediary between two other parties.

The court concluded that the school was the principal in this relationship and was therefore required to pay Gullivers, the third party, another £29,585 plus interest. It is disappointing that Thomas J did not take advantage of the opportunity to elaborate on his statement and discuss the application of agency obligations in the present context. This is probably because the agent had dropped out of the picture and therefore the only issue at hand concerned the contract between the principal and third party.

Alan Collier is a leading New Zealand tourism expert who views the role of the travel agent in the conventional way:[33]

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29 (1995) ATPR 41-417, 40,636.

30 [1991] 3 NZLR 304.

31 Mr Murray was not a TAANZ bonded travel agent, therefore the bonding scheme which protects customers from travel agent default did not apply in this situation.

32 Supra note 30 at 306.

33 Collier, *Principles of Tourism: A New Zealand Perspective* (2nd ed, 1991) 199 (emphasis added).

> The role of the agent is ... to act on behalf of a principal ... and the agent receives a commission from that principal. *No contract of sale will exist between the travel agent and the customer.* The agent is therefore acting so as to bring about a contract between the customer and the principal and will not normally be liable for any defects in the principal's products or services.

The TAANZ Guide for travel agents conveys the same impression, stating "[a] retail agent is almost invariably the agent of the supplier of services (the Principal) and is not liable for the defaults of the Principal, but he must make it known to the customer that he is acting as agent".[34] In its schedule of recommended terms and conditions for travel agents, TAANZ reiterates its point of view very succinctly:[35]

> 1.1 We are a travel agent and in that capacity we offer for sale to you various products and/or services *on behalf of our Principals* viz. airlines, other transport operators, hotels and other accommodation providers, tour operators and all other principal suppliers.
> 1.2 Our services consist of arranging and co-ordinating the services offered by the Principals. We are instrumental in bringing about a *direct contractual relationship between you, the customer, and the Principals.*
> 1.3 You should be aware that the brochures which we supply to you are the brochures of our Principals and that the statements and representations contained in such brochures are not ours but are made by the Principals. In many cases we have no first hand knowledge of the facilities or services referred to therein. We are merely passing on to you the Principal's instructions and we accept no liability for any inaccuracies or misrepresentations contained in such brochures.

2. Dual Agents / Brokers

Rosen v DePorter-Butterworth Tours Inc touched on the notion of dual agency.[36] This could not possibly mean that the travel agent would act as agent for both the client and the supplier at the same time because of the unacceptable and unworkable conflict of duties involved. It has been suggested, however, that the various responsibilities and duties might shift according to the specific phase of the transaction. An English travel case has held that the client's request to the travel agent that their hotel be located reasonably close to a friend's hotel was given to the travel agent in its capacity as agent for the plaintiff (the client) and not as agent for the defendant (the tour operator).[37] Therefore, it was not considered to be part of the contract between the plaintiff and the defendant. The judge considered that up to the time the booking was made, the travel agents were only the agents for the plaintiff; after that, they were agents for the defendants.

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[34] TAANZ, *Travel Industry Directory & Information Guide* (1998) 10.
[35] Ibid 11 (emphasis added).
[36] Supra note 24.
[37] *Green v Sunworld Ltd* Blackpool County Court November 1996, per Woods J.

One way of viewing a dual agency situation might be to regard the travel agent as a "broker". A broker is really an agent for two principals, introducing the other in each case as the third party. Authority for this is *City of Chicago v Barnett*, where the Court said: [38]

> A broker is distinguished from an agent in that a broker sustains no fixed and permanent employment by, or relation to, any principal, but holds himself out for employment by the public generally, his employment in each instance being that of a special agent for a single object ... whereas an agent sustains a fixed and permanent relation to the principal he represents and owes a permanent and continued allegiance.

Justice Kluczynski quoted the above statement in *Simpson v Compagnie Nationale Air France,* and added: "the broker is primarily the agent of the person who first employs him, and he cannot without the full and free consent of both, be, throughout the transaction, the agent of both parties".[39]

Cordato describes this metamorphosis from travel agent to travel broker:[40]

> Travel agents and tour wholesalers can be either agents or brokers depending upon their activities. The travel agent whose business activities consist only of the issuing of tickets to clients would be considered as an agent of the carrier, accommodation provider or tour operator for whom the travel agent has authority to issue tickets and book travel arrangements. However, where the travel agent takes on the task of arranging an itinerary or obtaining the most suitable or cheapest carrier fare or accommodation price, then the business of that travel agent would be more like a broker. In other words, that travel agent would be the agent of the client so far as organising the itinerary, the travel or accommodation as well as being the agent of the provider of the travel and accommodation. Obviously, there is a large "grey area" between facts and circumstances which make a travel agent an agent only of the carrier or provider of the travel and accommodation and facts and circumstances which make the travel agent a broker, an agent for both the customer and the providers of the travel and accommodation. Although the distinction can be important, no general guidelines can be given .... The travel agent is then a party to two separate agency contracts and rather than "disappearing" on formation of the contracts, remains a party and can be sued ....

In effect, this is saying that there is an ascertainable point, when making travel arrangements, when suddenly the travel agent owes fiduciary obligations to the client as well as the supplier. It is hard to accept a construction whereby the travel agent is an agent for a host of suppliers, and that the mere fact of requesting the cheapest airfare could convert a non-contractual exchange with the client into an onerous fiduciary relationship.

Cordato's comments also seem to suggest that a travel agent can be an agent for the client and the supplier at the same time, with the latter parties both acting as principals. He later acknowledges that this may give rise to a conflict of interests, for

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38 404 Ill 136, 142, 88 NE 2d 477, 481.

39 Supra note 28.

40 Cordato, *Australian Travel & Tourism Law* (2nd ed, 1993) 292.

example, secret commissions, but that this would be acceptable if the agent were to communicate this fact to the intending traveller. A travel agent's business is about securing travel arrangements for clients and it would surely be understood, without needing to disclose the fact, that it takes its commission out of the purchase price.

IV: FIDUCIARY DUTIES

The essence of an agency relationship centres around the imposition of fiduciary obligations for the benefit and protection of the principal. This section identifies the duties that are common to most agency relationships and then considers the anomalies of applying those duties to the travel transaction.

Bowstead defines agency as "... the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties".[41]

It is possible to regard fiduciary duties as implied terms of a contract, but they also exist independently of the contract. The appropriate remedy for their breach may therefore be something other than damages. It depends upon the nature of the fiduciary relationship, the nature of the breach, and all the facts of the case. The court may, for example, set aside the transaction in question, grant an injunction, or order an account of profits.

1. Fiduciary Duties of an Agent

As an agent has power to affect the legal relations of its principal, the law imposes controls on the way the agent can use that power. Fiduciary duties, or duties of loyalty, originate from the duties and responsibilities imposed by courts of equity upon trustees. Over the last century and a half, the duties of fiduciaries have developed to take into account the difference between trustees and others who hold special powers similar to the trustee. The particular duties owed will depend upon the circumstances, but it is possible to list certain fiduciary duties owed by most agents to their principals:

(a) the duty not to delegate his or her office;[42]
(b) the duty not to put himself or herself in a situation where his or her duties as agent conflict with his or her own interests (also known as the duty of "fidelity");[43]
(c) the duty not to accept bribes;[44]

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41 Reynolds, *Bowstead on Agency* (16th ed, 1996) 1.
42 *De Bussche v Alt* (1878) 8 Ch D 286 at 310.
43 *Boardman v Phipps* [1967] 2 AC 46.
44 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D.

(d) the duty not to take advantage of his or her position in order to gain benefits (for example, secret profits);[45] and
(e) the duty to keep the property of his or her principal separate and preserve correct accounts.[46]

These duties may also be placed into two categories: the undertaking rule and the conflict rules. The undertaking rule requires that a fiduciary must not use the position conferred except for the purpose intended and in the manner intended. A subset of this rule is termed the profit rule, which stipulates that a fiduciary shall not make or retain any unauthorised profit from the use of the powers or facilities he or she holds in a fiduciary capacity. Such profits are thought to have been received at the principal's expense, and therefore belong to the principal. The conflict rules include two types: the rule against conflict of duty and interest, and the rule against conflict of duty and duty.

A breach of duty may fall under any or all of the rules just mentioned, but the central purpose of all of them is the same. The essence of the duties is to ensure that the fiduciary acts in the best interests of the principal in exercising the power conferred on him or her. The rules are sometimes even thought to apply where there has in fact been no conflict, but merely the possibility of one.[47]

Arguably the most important duty is the agent's duty not to put himself or herself in a situation where his or her own interests conflict with his or her duties to the principal. This particular duty may encompass a number of the other duties and will also usually breach both the undertaking and the conflict rules. The agent should not be faced with temptation and have to balance his or her interests against those of the principal. It is the reason why real estate agents are not allowed to receive commission from both parties to a transaction and agents cannot make a profit from dealing with their principals' property or by exploiting their positions as agents.

In the words of Lord Cranworth LC in *Aberdeen Rly Co v Blaikie Bros*:[48]

> It is a rule of universal application, that no-one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, personal interests conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

2. Duties Of A Principal

English law has traditionally viewed the principal as the person requiring protection against wrongful use of the agent's powers, and has paid little attention to the

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45 *Keech v Sandford* (1726) Sel Cas Ch 61. The rule is rigid and all profits must be accounted for even if the agent has incurred a risk of loss and its principal has suffered no injury. Any profit or gift is said to be an inducement if it in any way influences the agent.

46 *Foley v Hill* (1848) 2 HL Cas 28, 35-6.

47 For example *Boardman v Phipps*, supra note 43.

48 (1854) 1 Macq 461, 471.

position of the agent. It is generally understood that the principal is under no duty to account on a fiduciary basis to the agent. Certain general duties do exist though, namely, to avoid wrongly preventing the agent from earning commission, to pay the agreed commission or remuneration, and to indemnify against liability and expenses lawfully and reasonably incurred.

3. Fiduciary Duties in Travel

In the third section we saw that the legal relationship between travel industry participants has not always been interpreted in a consistent fashion. In the majority of cases, however, the travel agent is regarded as being in an agent-principal relationship; the travel agent is usually the agent, while the principal can be either the tour operator, supplier, or consumer depending on the circumstances. Defining the relationship in this way would not be so problematic if the respective proponents justified their decisions and provided a set of criteria for future application. As it stands, the position of the travel agent at law is vague and uncertain.

If the relationship were one of true agency, then fiduciary duties would be a necessary component of that relationship. The previous section provided an overview of the types of duties that are common to most agency relationships and the reasoning behind their imposition. The present section will consider the place of fiduciary duties in the travel industry and whether this is appropriate in today's commercial environment.

In the Federal Court of Australia,[49] Beaumont J disapproved of assuming that agency applies to the travel transaction. He quoted from Heilbronn, stating that "the 'travel agent' is not a legal term of art, but is a generic term describing persons engaged as 'middlemen' or 'brokers' in selling travel products".[50] His Honour went on to say:

> [I]n acting as middlemen between potential travellers and persons or corporations in the business of supplying travel and tourism products, eg airlines, it is not always clear when an agent is acting for one, the other, both, or merely for himself or herself.... [It] is not possible to generalise in this area and regard must be had to the particular circumstances of the case at hand.

Lord Upjohn issued a similar warning in *Boardman v Phipps*:[51]

> The facts and circumstances must be carefully examined to see whether in fact a purported agent ... is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position.

In spite of the warnings to take each case on its individual circumstances, industry participants still attempt to categorise travel agents as legal agents. It is understandable

[49] Supra note 29.
[50] Supra note 7 at 185-6.
[51] Supra note 43.

however, because it means that travel agents are therefore absolved of liability in the majority of situations. In effect, it is a protective definition for travel agents to hide behind instead of incurring direct contractual liability. Atherton views this in the following way:[52]

> [T]he important point to note is that the travel agents and tour operators endeavour to organise their affairs so that they are mere agents and the real principals are the airlines, hotels and other component suppliers. This then affords them, in a contractual dispute, the very effective defence of privity. Travel agents and tour wholesalers are sufficiently in control of the brochure and other package tour documentation to ensure the relationship is structured in this way.

In taking Lord Upjohn's advice, it is important to look beyond the title of agent and have regard to the particular circumstances. In the majority of travel transactions, the existence of several of the legal requirements necessary for the establishment of an agency relationship are tenuous to say the least. The duties incumbent on a fiduciary are far removed from the reality of the situation between the parties.

For example, one of the duties stipulates that an agent cannot, without the principal's knowledge, make any personal profit from its principal's dealings beyond the commission agreed.[53] The agent must act bona fide in the interests of the principal and make full disclosure. In practice, travel agents will try to inflate prices where possible because they work on such low margins. The only apparent restriction is a duty imposed by IATA not to sell airfares for *less* than the published amount. Apart from competitive market forces, a travel agent is not constrained from adding a mark-up onto the sale price of a tour, accommodation, or any other service. This would seem to contradict the aforementioned duty under agency law.

The duty not to make any personal profit from the principal's dealings also raises interesting questions over the impending introduction of service fees. TAANZ is presently encouraging travel agents to implement a system of charging clients for bookings.[54] Prima facie, a contractual service fee paid by the third party consumer would appear to be a conflict of interest to the agent's supplier under typical agency analysis. This is the same reason why real estate agents cannot earn a commission from both parties to a transaction. It could be argued that travel suppliers have tacitly consented to the extra fees, but that is unrealistic – a foreign hotel or operator does not care how much a travel agent charges for their product, so long as at the end of the day they get paid.

The fiduciary duty to keep property (including money) of the principal separate from the agent's and that of other persons, includes the concomitant duty to preserve correct accounts of all its dealings and transactions in the course of the agency, as well as to produce to the principal all documents relating to the principal's affairs.

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52 Supra note 5 at 106.

53 *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41, 103, per Mason J.

54 This is largely to counteract the recent commission cutbacks by airlines on airfares sold by travel agents.

Although this would seldom occur in practice, it is hard to imagine the travel agent readily availing a hotel of its accounts. Strictly speaking though, this would be a legitimate request under the law of agency.

One of the most important agency law rules is the duty to avoid conflicts of interest and duty or conflicts of duties. This rule would be endlessly breached by the travel industry. For example, a travel agent may choose a particular hotel over another simply because of a higher commission it expects to receive. Likewise, some airlines offer incentives to travel agents in the form of overrides. An override is a percentage payment over and above the standard commission rate, which the airline usually pays to the travel agent in the form of a monthly or fortnightly cheque. It encourages the travel agent to book a particular airline, and once it has reached a prearranged target, the travel agency qualifies for a higher override. Often the travel agent is simply booking passage because it is the cheapest available price or is most convenient for the particular client. This inevitably involves a choice between competing airlines, thus resulting in loss to the remaining airlines. The travel agent will generally choose between suppliers according to the particular merits and incentives each has to offer, not because of any obligation.

This sort of practice is consistent with a normal commercial arrangement between contracting parties, but would surely jeopardise any fiduciary responsibility to other airlines, if they were to exist.[55] It would be ridiculous to circumscribe a travel agent's activities by enforcing the fiduciary obligation, so it can only be assumed that the duty is modified by trade custom.

The relationship between travel agents and airlines, however, is arguably closer to an agency relationship than the other suppliers, in spite of the functional difficulties highlighted. Most of the typical fiduciary obligations are noticeably absent, but it could be argued that the Sales Agency Agreement that governs the relationship between travel agents and airlines is an express modification of those obligations.[56] This agreement authorises the travel agent to, *inter alia*, promote and sell air passenger transportation offered by its member carriers and to issue tickets.[57] It specifically limits and regulates the activities of the travel agent with regard to reservations on the carrier.

From another perspective, principal suppliers would also breach their duties to travel agents on many occasions. Although travel agents account for around 80 percent

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55 Other factors influencing a travel agent's choice of supplier may be due to lower transaction costs in booking one product over another, or simply the rapport that develops between travel agents and particular suppliers.

56 Variation of agency contracts is discussed infra, in "4. Variation Of Fiduciary Duties".

57 Wohlmuth believes that these procedures are more analogous to the licensing requirement imposed by the state on persons desiring to engage in certain activities, in that they are prerequisites which must be met before a particular business relation may be created, whether it be agency, contract or something else. He adds that both the Sales Agency Agreement and IATA stipulate that the travel agent shall not hold itself out to the public in any way as a general agent, or use any other designation indicating that its office is that of the carrier. These limitations cast doubt on the existence of an agency relationship between airlines and travel agents (supra note 24 at 39).

of airline sales, and the figure for hotels would be almost as high, suppliers always market directly to consumers. Hotels will sometimes invite customers, particularly corporate travellers, who have booked through travel agents to make future reservations direct with the hotel, thus cutting out the "middle-person".[58] They "sell" this to the clients by affording them a discount, which is usually the commission they would have paid to the travel agent.[59] Competing directly for business and undercutting the travel agent would prima facie breach the duty to allow the agent to earn commission.

The practical hurdles of agency analysis are as conspicuous as the legal ones. Consider this scenario: if we are to assume that travel agents are legal agents, then as soon as the travel agent has effected a valid contract between the supplier and the client, he or she would drop out of the picture and have no contractual responsibility towards the client.[60] What that means is that the disgruntled traveller could arrive home after a disastrous holiday, and his or her only recourse would be to sue the (usually) foreign supplier. From a conflict of laws perspective, this would require long-arm service to the relevant country,[61] and there is no guarantee that the "principal" would even defend the action.[62] Alternatively, the client would have the expensive and impractical option of suing abroad. The reality is that in the absence of negligence or a separate contract with the local agent, the client would often be left without a remedy.

There is another important element of agency law that occasionally arises in a travel context. The doctrine of the undisclosed principal is unique to agency theory, and it often seems to be used in situations where the innocent party would otherwise be left without a remedy. The rules of agency generally require satisfactory disclosure or identification of the principal, and where this is not clear, the agent may itself be held to be principal in the particular transaction. The inference is that the parties intended the agent to possess personal rights and liabilities under the contract. When and if the third party subsequently finds out about the principal, they can elect to sue the principal or the agent.

In *Siegel v Council of Long Is Educators Inc*, the New York Supreme Court stated:[63]

> The law presently lacks clarity with respect to the relationship between the travel agency and its clients. Since the traveler who deals with a retail travel agent has no contact with

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58 This often happens with corporate clients, whose frequent patronage is sought.

59 From the travel agent's point of view, this is a particularly aggravating feature of hotel practice. If this were a true agency relationship, then agents should be able to hold the hotel accountable for breach of duty. In practice it is not treated that way, and if discovered, it is usually considered a lack of good faith whereupon the travel agent will simply refuse to book that hotel in future.

60 If there is no contract between the customer and the travel agent, then on what basis do they include terms and conditions on the back of all itineraries and quotations?

61 Unless there is a local representative.

62 Contracts for international carriage are often governed by international conventions, which include provisions as to the applicable law. The example given is more to demonstrate the problems with other suppliers such as hotels, sightseeing companies, etc, that are not so heavily regulated by international conventions.

63 348 NYS 2d 816 at 817.

> the wholesaler, it is our opinion the retail agent must be held responsible, irrespective of any disclaimer in the brochure ... [T]he disclaimer is ineffective, in any event, since the travel agent represented itself as an agent of an undisclosed principal. An agent is liable for his acts, even though the other party knows he is acting as an agent, if the identity of the principal is not disclosed.

In a travel context, the potential for applying the undisclosed principal doctrine is disturbing.[64] For example, difficulties may arise with the intricate ownership structure of hotels where the hotel is not incorporated under its trade name. The weight of authority appears to hold that the disclosure of the principal's trade name in these circumstances is not always sufficient disclosure. In *E A McQuade Travel Agency Inc v Domeck,*[65] it was held that the travel agency had not sufficiently disclosed the identity of the principal owner. Disclosure of the trade name, the name of the ship, was not enough.

Without examining the finer points of the doctrine, it seems contrary to modern commercial reality to hold a travel agent liable for a supplier's breach, simply because the true ownership details may not have been apparent. The reasonable person entering a travel agency would not expect the travel agent to own or control the airlines, hotels, and rental car companies that it books. Although the legal status of the client's relationship with the travel agent may be uncertain, consumers are generally aware of the function of travel agents. The doctrine of the undisclosed principal itself is fraught with anomalies, and has plagued the courts for a long time. It seems counter-productive to add to its problems by applying it to the challenges of the travel industry.

Fiduciary duties owed by an agent to its principal evolved from the duties owed by a trustee to its *cestui qui trust.* In this respect, they epitomise a relationship of absolute trust and confidence. Does a travel agent belong in this category vis-à-vis the suppliers it books on behalf of customers? Should travel agents be subject to onerous duties of loyalty requiring them to put suppliers' or clients' interests before their own? It is not possible to answer this conclusively, but if the fiduciary obligations necessary for an agency relationship at law are so modified to the point of being non-existent, then perhaps agency is not the right legal mechanism to use. With hotels and other suppliers in particular, the case for agency is especially weak. Frequently, the agent has had no prior contact with the supplier at all, for example, where the client requests a particular hotel, or the name of one is taken from a brochure. This would seem to deny any actual authority.

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64 An interesting application of this doctrine could arise in respect of "codesharing" between airlines, namely, where one airline pays for seats on another airline operating a particular route, but in all communications and confirmations the name and code of the purchasing airline is used instead of the actual carrier. A client may be completely unaware that he or she has booked one airline's aircraft, when all the correspondence has indicated a completely different airline.

65 Supra note 26.

4. Variation of Fiduciary Duties

Fiduciary duties may be limited, restricted or even excluded by contract. There may be express terms of a contract modifying the fiduciary obligations, or they may be implied out of necessity or trade custom. In *Yasuda Fire and Marine Ins Co of Europe Ltd v Orion Marine Ins Underwriting Agency Ltd,* Colman J stated the following:[66]

> The rights and obligations arising as a matter of law from the existence of duty-creating relationships ... are not in principle displaced by contractual rights and obligations unless the contract provides that such rights and obligations are to be excluded or includes remedies which are inconsistent with the duties attributable as a matter of law to the relationship.

One way of justifying the incongruity of travel operations and fiduciary law would be to regard the agency agreement as varied by virtue of trade custom. *Kelly v Cooper* is authority for this principle.[67] In that case, an estate agent acted for adjacent beachside property owners in Bermuda. He omitted to inform the vendors that Ross Perot wished to buy both properties in order to convert them into a single estate. Given that it might have allowed each seller to demand more for his land, the question arose as to whether the agent ought to have told the principals of the potential buyer's interest. Despite the conflict of interests between the agent's duties to his two principals, Lord Browne-Wilkinson held that it was well known that estate agents often work for multiple vendors, and that "there must be an implied term of the contract with such agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals".[68]

The decision was justified on the basis that the agent's duty of confidentiality to each principal prevailed. It was also a practical solution that would be workable in the context of land agents. It is a shame that there has not been a similar case to test the issue in a travel context. There is a distinct difference between the two scenarios, however. *Kelly v Cooper* involved a single variation to a firmly established and well documented agency relationship. Real estate agents have long been categorised as agents in the full sense, and this modification was an amendment of the principles to take account of commercial reality. However, the role that travel agents play is still uncertain and it is unclear whether they should be regarded as agents at all. Their activities are so foreign to the principles and purposes of agency law that any contractual variations would have to cover practically every aspect of the relationship. The extent of the modifications would effectively be to contract out of almost every fiduciary duty.

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66 [1995] QB 174, 186.
67 [1993] AC 205.
68 Ibid 214.

If this is the case, then it must be seriously considered what the best approach ought to be: do we work backwards by prima facie applying agency theory and subjecting it to the numerous variations that would have to be made, or do we start with a clean slate by bringing the relationship in line with other commercial relations and base it on normal contract principles? Wohlmuth summarised the position well when he said that "there is nothing to distinguish these services (making travel arrangements) in the minds of either the client or the travel agent from those performed by others who deal at arm's length with their customers ... except, perhaps, that the travel agent must look elsewhere for their execution".[69]

5. Summary

It is submitted that in the everyday travel transaction between customer, travel agent and supplier it has never been the practice, nor should it be law, to impose fiduciary responsibilities on travel agents. This is not to say, however, that agency will never arise in a travel context. There will be situations which call for a travel agent to observe duties of loyalty that go beyond a contractual framework. Fiduciary obligations often exist alongside other obligations so that the relationship is regarded as fiduciary in some aspects but not in others. Bowstead cautions that:[70]

> [T]he word "agent" can be used in varying senses, and not all persons to whom the word is applied are agents in the full (or sometimes, any) legal sense .... But ... it is conceivable that circumstances might give him knowledge of and power over his principal's affairs which could justify the imposition of some fiduciary duties.

It is undeniably clear that travel agents do assume an intermediary role in bringing together consumers and tour operators or suppliers. That does not mean to say they should automatically be subject to the onerous fiduciary obligations of agency law. The following proposition acknowledges this possibility:[71]

> [N]ot every person who can be described by the word "agent" is subject to fiduciary duties; and ... a person who certainly is so to be described may owe such duties in some respects and not in others. Hence it is said that there may be a 'non-fiduciary agent', and that in some functions an acknowledged agent may not act as fiduciary.... Rather than talk of a "non-fiduciary agent" it seems better to say that where an agent does not act in a fiduciary capacity... this is a reflection of the scope of his duties and the boundaries of the equitable rules.

The final section of this paper suggests an alternative construction to agency law for typical travel transactions.

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69 Supra note 23 at 42.
70 Supra note 41 at 196.
71 Ibid 195.

V: CONTRACT: AN ALTERNATIVE CONSTRUCTION

The preceding sections have highlighted the discrepancies in applying an agency analysis to the relationships between travel agents, suppliers, and consumers. In particular, we have seen that fiduciary responsibility is the hallmark of a relationship based on absolute trust and confidence. There is little legal or practical justification for regarding the travel transaction in this way, and the subject of this next section is to suggest an alternative construction.

It is more realistic to regard the travel industry as a network of contractual relationships; an "interweaving of contractual relations".[72] As far back as 1966, Wohlmuth thought that contract law was a more acceptable legal framework of travel agent liability than agency because it conforms more closely to the realities of the travel industry, and "unlike the agency theory, it meets the issue of travel agents' liability head on".[73] The travel agent's role is therefore one of independent middle-person in the business of bringing the supplier and the client together, without being an agent for either.

2. Case law

There is a growing body of overseas case law that tends to indicate a willingness by the courts to find a direct contract between the travel agent and the traveller. Similar findings in this country are not yet evident.

In *Wong Mee Wan v Kwan Kin Travel Services* Ltd the Privy Council had to consider the liability of a travel agent who had organised a tour to China.[74] The client arrived at a pier expecting to be taken across a lake when she was informed by the tour guide that they had missed the ferry and would have to make the crossing by speedboat. En route, the boat hit a fishing junk, the occupants were thrown into the water and the plaintiff's daughter was drowned. The plaintiff brought proceedings against the travel bureau claiming damages for breach of contract. The Privy Council held that it was a matter of construction whether the contract was merely for the arrangement of services that were to be provided by others, in which case there was an implied term that he would use reasonable care and skill in selecting those persons; or one where the defendant agreed to supply the services, in which case there was an implied term that he would carry out the services with reasonable care and skill,

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72 Supra note 23 at 33.

73 Despite the fact that Wohlmuth's article was written prior to most of the reported travel cases, he has a very clear appreciation of the problem. It is extraordinary that 33 years later, the courts are still undecided on the travel industry's position at law.

74 (1995) 4 All ER 745.

subject to any exemption clause. In either situation, the court was only interested in applying contractual principles. Fiduciary duties were never mentioned.[75]

In the Supreme Court of South Australia case of *Odgers v McMiken*,[76] the client requested the travel agent to arrange a trip from Adelaide to England and return. The client was told that his vouchers could be exchanged for tickets in London, but he ended up being stranded there because the organisation would not exchange them. He had to make alternative arrangements to fly home, where he claimed the costs against the travel agent. Chief Justice Bray stated:

> I agree ... that the true contract was a contract to arrange for the transport of the respondents and their family by booking them onto ships and aeroplanes and providing them with documents which would be recognised by those who did operate the relevant ships or aeroplanes as entitling them to travel thereby.

This judgment is consistent with a sensible analysis of the travel agent's role. Once the travel agent has carried out his or her contractual duties to furnish the client with valid documentation and to provide any other services that the client requests, then his or her responsibility for the actual performance by the supplier should legally end. A travel agent can no more control the actions or omissions of a (usually) foreign hotel or major airline than those suppliers can exercise control over an independent travel agent.

Craven v Strand Holidays (Canada) Ltd considered the liability of the defendant travel agent who had agreed to supply the respondent travellers with a Columbian tour including transportation, hotels and meals.[77] The majority found that the travel agency was not liable for injuries sustained by the travellers when the tyre of the bus blew out. They summarised the legal relationship as follows:

> [A] person is not liable for the negligence of an independent contractor unless he has a primary obligation to carry out a non-delegable duty imposed upon him by law or by contract. It is clear on the evidence that Strand never undertook to perform the bus transfers but merely to arrange for this service by a third party...

A similar conclusion was reached in *Erickson v Ottawa Travel Ctr Inc*,[78] where the presiding Justice affirmed the lower court's decision, declaring that the defendant had fulfilled its contract by procuring the plane tickets and steamship tickets, and that in the absence of negligence they were not an insurer of the plaintiff reaching the ship.

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[75] The court tended to focus more on an assumption of responsibility. If a travel agent undertakes to ensure that the client will be safe in using certain suppliers, as opposed to merely using reasonable care in the selection of suppliers, it will be subject to a higher degree of responsibility for the client's safety.

[76] (1974) 8 SASR 122.

[77] (1982) 40 OR (2d) 186, 142 DLR (3d) 31, 37.

[78] (1979) 387 NE 2d 49.

In *Athens - MacDonald Travel Service Pty Ltd v Kazis,*[79] the travel agency contracted to supply Kazis with an air travel itinerary that would provide a stay of at least three months in Cyprus. Before Kazis left on his trip, the travel agent advised him that the arrangements that had been made would shorten the holiday by three weeks. He was told however that if he went via Melbourne, this problem could be fixed up in Athens. The Supreme Court of South Australia found that the travel agent had deliberately deceived Kazis in respect of their representation that the problem could be fixed in Athens. The travel agency was in breach of its contract to provide Kazis with the travel facilities for a three month holiday in Cyprus.

Attempts have often been made to frame a travel agent's obligations in terms of contract, but judges seem reluctant to let go of the last vestiges of agency theory. Perhaps a failing in many travel cases is that many judges assume the applicability of agency law without properly considering the fiduciary duties that attach to this legal relationship. The alternative analysis may be largely unprecedented in the travel context, but it is interesting that many judges seem to prefer the principles of contract law in their application. In some cases, this is accomplished by regarding the client as principal instead of the supplier. In that way, the client is in a direct contractual relationship with the travel agent and liability can legitimately be based on contract law principles.

Wohlmuth states that there may be an implied warranty by the travel agent to the client for the end product. He believes that the travel agent has ultimate recourse against the person whose "product" it sells and is the party best able to bear the risk of loss by passing it on to the consumer through higher prices. It is submitted that this would be to extend liability on travel agents to an unreasonable degree. Firstly, there is no basis for implying such an obligation in a contract, particularly where performance is out of the travel agent's control and subject to innumerable external factors. Secondly, the margins on travel are minimal and unless travel agents start charging for their services, few would be prepared to expose themselves to such liability. Providing the travel agent has acted with due care and skill in securing those arrangements, there is no reason to hold them accountable for the failure of the supplier. Besides, in conformity with modern commercial practice, travellers should take out travel insurance to cover this sort of eventuality.

3. The Alternative Analysis

The suggested "contractual network" may be viewed in the following way. All three contracts could exist in a given transaction.

(a) Standing offer by suppliers of unilateral contracts to travel agents[80]

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79 [1970] SASR 264.

80 As in *Great Northern Rly Co v Witham* (1873) LR 9 CP 16.

By agreement, or custom, the supplier undertakes to pay commission if the travel agent:

(i) books a client with them;
(ii) issues the required documentation; and
(iii) collects the deposit or full amount and remits the same, or arranges for the client to pay direct.

(b) Bilateral contract between client and travel agent

The client makes the offer by asking the travel agent to secure reservations and the travel agent accepts this by agreeing to make them. Implied in this contract would be a promise by the travel agent to make reasonable efforts to secure reservations for the client, deliver the necessary documentation, forward payment on to the supplier and process any refund due. The obligation is to arrange for proper performance of carriage and not actually to perform it.[81] In addition, it is submitted that the implied term to exercise due care and skill should be extended to the giving of advice on visas, passports, vaccinations and so on. Although TAANZ's recommended terms and conditions state that the legal onus lies on the traveller to ensure that it has the necessary documentation, one would expect a reasonable travel agent to advise on such matters in the course of their business. The client would impliedly promise to fulfil its obligations to the supplier when they arise.

(c) Bilateral contract between supplier and client

The contract comes into existence when the supplier has consented to be bound, usually by a confirmation to the travel agent that they will accept the client's reservation. In respect of hotels, rental cars and sightseeing operators, this is usually done via telephone, fax or computer reservation. However, for airlines, determining the exact time at which the contract of carriage is formed has been problematic for the courts.[82]

In the High Court of Australia case of *MacRobertson Miller Airline Services Ltd v Commissioner for State Taxation*,[83] three judges came up with slightly different analyses:

(a) Chief Justice Barwick thought that the issue of an airline ticket is a receipt for

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[81] In *Wall v Silver Wings Surface Arrangements Pty Ltd* 1981 QB (unreported), the Court refused a remedy to a traveller who was seriously injured when a fire escape was locked by hotel management for security reasons in her hotel. The contract with the tour operator contained no implied term that the plaintiff would be reasonably safe in using the hotel chosen by the defendants.

[82] This topic is deserving of its own research paper. For present purposes, it is only necessary to acknowledge the confusion that exists in this specialised area.

[83] (1976) 8 ALR 131.

payment rather than an entitlement to travel, namely, that the mere purchase of an air ticket may not create a binding contract to carry. His Honour stated that the airline operator was not in contractual relations with the intending passenger until it had provided him with a seat on the aeroplane.

(b) Justice Stephen held that the situation was a standard "ticket case" contract, in that the issue of a ticket is an offer by the airline. Acceptance occurs when the passenger, after having the opportunity to ascertain its conditions, confirms the flight and checks in at the airport.[84]

(c) Justice Jacobs thought that the carrier makes an offer by tendering the ticket. The ticket is a legal entitlement to carriage that gives rise to a contract when the passenger presents the ticket and commences the trip. In other words, the ticket stands as prima facie evidence of an executory contract of carriage between the traveller and the supplier.

Cordato believes that in a simple contract of carriage the carrier makes the offer, usually by the issue of a ticket in return for payment. Acceptance is completed by the passenger presenting their ticket and undertaking the journey.[85] Complex travel contracts, on the other hand, start with a brochure as an invitation to treat and which sets out the rules for acceptance. The offer is made by the traveller who requests that the travel agent or tour operator book a tour in accordance with the brochure or booking form.

There are difficulties with finding that acceptance by the passenger does not occur until they have commenced the journey, or have been allocated a seat and so on. Once a ticket is issued, the airline may charge cancellation fees if the passenger decides not to travel. On what basis can they do this if there is no concluded contract at that stage? In effect the airline is saying: "If you do not accept this offer then you will be penalised".

Controversy still surrounds this issue and there may be cases where a contract arises on the issue of, and payment for, a ticket.[86] It seems logical to treat payment by the client as the contractual offer, and acceptance is the issuance of the ticket. The 1929 Warsaw Convention and its 1955 Hague Protocol that governs liability for accidents in international air carriage both re-affirm that the passenger ticket is prima facie evidence of both the conclusion of the contract and its conditions. The writing on a ticket, however, will not necessarily constitute *all* the terms of the contract. The remainder may be found: in other express promises made by the parties; implied by common law, statute or custom; or incorporated by reference on the ticket or elsewhere to standard terms and conditions.

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[84] Variations exist between airline practices, however, as some airlines allocate seats prior to check-in.

[85] Supra note 40 at 39.

[86] Charter flights, for example.

4. Damages for Breach of Contract

If the travel agent has breached its contractual duty to exercise due care and skill, the client should have direct recourse to the travel agent for damages. The increasingly popular head of damages for disappointment and distress should also be available if it flows naturally from the breach. This head of damages originated from a travel case and its existence and application is entirely consistent with a contractual basis for travel agent liability. Following is a brief summary of a few travel cases where damages were awarded for disappointment and distress.

In *Jarvis v Swan Tours,* Lord Denning thought that "in a proper case, damages for mental distress can be recovered in contract, just as damages for shock can be recovered in tort. One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment".[87] The extravagant language in the brochure constituted contractual promises, and damages were awarded for breach of those contractual promises, not only to compensate for the cost of the holiday, but also for disappointment.

In the famous words of Edmund Davis LJ:[88]

> If ... travel agents fail to provide a holiday of the contracted quality, they are liable in damages. In assessing those damages the court is not, in my judgment, restricted by the £63.45 paid by the client for his holiday. Nor is it confined to matters of physical inconvenience and discomfort, or even to quantifying the difference between such items as the expected delicious Swiss cakes and the depressingly desiccated biscuits and crisps provided for tea, between the ski-pack ordered and the miniature skis supplied, nor between the "very good" ... houseparty arrangements assured and the lone wolf second week of the unfortunate plaintiff's stay. The court is entitled, and indeed bound, to contrast the overall quality of the holiday so enticingly promised with that which the defendants in fact provided.

Similarly, in *Baltic Shipping Co v Dillon (Mikhail Lermontov)*:[89]

> In the present case, the plaintiff was promised a holiday cruise, an interlude to relax the mind and refresh the spirits. Or, at the least, the defendant promised to exercise all reasonable care to provide such a cruise.... The "disappointment and distress" in respect of which the trial judge awarded an amount of damages was a result of the shipwreck that occurred in breach of the defendant's contractual obligation. It was such an inevitable and direct result of that breach that it is proper to hold that it flowed naturally from the breach.

In *Stedman v Swan's Tours,*[90] the plaintiff made arrangements with the defendant travel agents that his party of six should be taken by air to Jersey and should there

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87 [1973] QB 233, 237.
88 Ibid 239.
89 (1993) 67 ALJR 228, 309, per Brennan J.
90 (1951) 95 Sol. Jo. 727.

be provided with superior rooms with a sea view in a first-class hotel. The party arrived to find that the rooms were not "superior" and had no sea view. They were unable to obtain accommodation elsewhere and the holiday was spoilt. Lord Justice Singleton held that damages could be recovered for "appreciable inconvenience and discomfort" caused by the breach of contract. He added that even though it might be difficult to assess the amount to be awarded, it was no more difficult than assessing the amount to be given for pain and suffering in a case for personal injuries.

Finally, in *Jackson v Horizon Holidays Ltd,*[91] it was held that the plaintiff was entitled to damages not only for his own distress, but also for that of his wife and children who accompanied him on the holiday. Lord Denning found that one who makes a contract for the benefit of others should be able to recover on their behalf and "pay it over to them".[92]

VI: CONCLUSION

In the second section we saw that a travel agent's legal liability may be difficult to determine, essentially for the following reasons: the subject-matter is an intangible experience, the travel agent is selling someone else's product, there is a broad range of participants in a single transaction, the supplier is often located abroad, the travel industry continues to define itself in "agency" terms and there is a complicated array of industry standards and regulations, both domestic and international. It is not surprising that the principles of agency do not appear to have been logically applied in decisions regarding travel disputes and there has been little discussion as to whether agency is in fact the correct legal basis at all.[93] In many cases, liability is admitted and the quantum of damages is the only issue. In others, the question seems to be dealt with by way of assumption. It is unsatisfactory to continue with this ad hoc method and serious thought needs to be given to the nature of travel transactions. If agency is the appropriate area of law, the basis upon which its strict rules and duties are modified and who fulfils the role of agent and principal in the typical case ought to be clarified.

The third section provided an outline of the various capacities in which travel agents have been defined by judges and writers. Although the relationship is often viewed in terms of agency, there is seldom any judicial analysis of what the scope of the relationship is, or ought to be. If fiduciary obligations do exist in the travel relationship, but are modified by implied contractual terms, then it is desirable that this be expressly recognised. It is submitted, however, that agency law is not the correct foundation of travel agent liability. The principal criticism of agency is that travel agents do not fall comfortably within the definition of a fiduciary. The essence

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91 [1975] 3 All ER 92.

92 In New Zealand the Contracts (Privity) Act 1982 would apply to a situation such as this.

93 The travel profession itself seems to apply contradictory standards and assertions.

of a fiduciary relationship is supposed to be one of absolute trust and confidence, requiring the agent to sacrifice the pursuit of self-interest. The relationship between travel agents and customers or suppliers is more akin to everyday commercial transactions. Suppliers are in direct competition with travel agents and there is constant haggling over rates and commissions, particularly with airlines. Similarly, a travel agent will often choose between a number of suppliers when making recommendations to the customer and is under no duty to use any in particular. Many factors will influence the decision: price, incentives, features, location, frequency, personal experience or recommendation. If this were a fiduciary relationship, there would be some sort of limitation over the selection process. As it stands, the element of control by the principal is not apparent.

In attempting to categorise the proper legal nature of travel agent liability, Wohlmuth believes that: [94]

> [T]he travel agent does not fit neatly into any preconceived cubbyhole, whether it be agency, contract or any other. This is attributable partly to the unique structure of the travel industry and partly to the fact that rarely do legal concepts fully reflect business realities.

He suggests that how the middle-person is viewed at law should depend upon what aspect of the relationship is under consideration and what objectives are being pursued. The policy advantages in protecting the consumer outweigh the advantages in permitting the middle person to be insulated from liability by virtue of the status of agent. So, even though the travel agent might be considered an agent for the purpose of communicating offers and acceptances, liability growing out of contract principles could still be applicable to it. He feels that this solution is probably preferable to treating the travel agent as *sui generis* and then fashioning legal principles to fit the situation.

The general thrust of the assertions Wohlmuth made in 1966 is still relevant today. Essentially the issue is under what circumstances and upon what basis should the travel agent be held liable to the client? It was proposed in the sixth section that the travel agent is simply in a contractual relationship with its clients, wholesalers and suppliers, and the scope of its liability hinges upon what the travel agent expressly and impliedly undertakes. Contract law reflects the practical reality of the travel transaction today and would provide a simpler and more ascertainable basis of liability.

The lack of clarity and ad hoc approach to the defining of travel relationships needs to end. There is no justifiable reason why the rights and obligations of the parties cannot, or should not, be subsumed into a "travel contract".

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[94] Supra note 23 at 51.