FIDUCIARY LAW, NON-ECONOMIC INTERESTS AND AMICI CURIAE

LISA ZHOU*

This article examines the role that amici curiae can play in improving the protection of non-economic interests in Australian fiduciary law. The current lack of protection of non-economic interests in Australian fiduciary law is doctrinally and philosophically problematic. In comparison with Australian fiduciary law cases, amici curiae participate more frequently and play a more significant role in the fiduciary law cases of other jurisdictions where non-economic interests are more readily protected. The increased participation of amici curiae in Australian courts would facilitate a more sensitive development of fiduciary principles in relation to non-economic interests. Furthermore, increased participation of amici curiae is consistent with the general principles and underlying concepts of fiduciary law and equity.

CONTENTS

I Introduction ...........................................................................................................1158
II Non-Economic Interests and Fiduciary Law .........................................................1159
   A The Law ....................................................................................................1159
   B Feminist Critique ......................................................................................1161
III Amici Curiae and M(K) ..................................................................................1164
   A Amici Curiae .............................................................................................1164
   B Intervention in M(K) .................................................................................1165
      1 Fiduciary Breach ...............................................................................1165
      2 Delay ............................................................................................1168
IV Rationales for Increased Amicus Participation......................................................1169
   A Improvement of Fiduciary Law ................................................................1169
   B Consistency with General Principles of Equity ........................................1173
V Application to Australian Fiduciary Law: Paramasivam ......................................1175
   A Fiduciary Breach ......................................................................................1175
   B Delay .........................................................................................................1177
VI Conclusion .............................................................................................................1180

I INTRODUCTION

The current lack of protection of non-economic interests in Australian fiduciary law is problematic from both doctrinal and policy perspectives. An important feminist objection to this approach is that it systematically disadvantages

* BCom, LLB (Hons) (Melb). An earlier draft of this article was submitted as part of coursework undertaken for the LLB in the Melbourne Law School, The University of Melbourne. I would like to thank Matthew Harding for his supervision and comments on earlier drafts of this article.

sexual abuse victims, who are overwhelmingly women. The more expansive Canadian jurisprudence recognises that sexual abuse can be a fiduciary breach even where non-economic interests are involved. A notable feature of the Canadian case law is the frequent participation of interveners or amici curiae, whereas in Australia amicus participation is less frequent.

In this article, I argue that amici may, in some cases, play a facilitative role in the more sensitive development of Canadian fiduciary law in the sexual abuse context. Furthermore, Australian courts should more frequently permit amicus participation because this would contribute to the development of fiduciary principles in relation to non-economic interests which more appropriately recognise women’s interests. In Part II, I compare the approach taken in Australian fiduciary law to non-economic interests with that of Canadian courts, and discuss feminist objections to the Australian approach. In Part III, I analyse the case of \( M(K) \) v \( M(H) \) (‘\( M(K) \)’) and argue that amici can influence the responsive development of fiduciary principles with respect to non-economic interests. In Part IV, I consider in more detail the rationales for increased amicus participation. In Part V, I argue that amicus participation in the leading Australian case of Paramasivam v Flynn (‘Paramasivam’) could have facilitated an approach that would have been different from and better than the predominant Australian approach.

II NON-ECONOMIC INTERESTS AND FIDUCIARY LAW

A The Law

Outside the presumptive fiduciary relationships, which are not entirely settled, Australian courts predominantly favour the ‘undertaking approach’ when finding a fact-based fiduciary relationship. In Australia, fiduciary duties are generally proscriptive. Australian courts also tend to view an economic interest


5 Ibid 365.


7 (1998) 90 FCR 489.

8 See Bruninghausen v Givanics (1999) 46 NSWLR 538, 540 (Priestley JA), 555 (Handley JA), 562 (Stein JA); Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J); 141 (Dawson J) (‘Hospital Products’); Joyce, above n 1, 242–3.


as a requirement of a successful fiduciary action; where non-economic interests such as harm to bodily integrity and emotional harm are involved, there is no relevant subject matter to which a fiduciary duty can attach. This may be the case even where the relationship or the alleged misconduct appears to satisfy the elements of a fiduciary action.

Canadian courts, on the other hand, recognise a wider range of presumptive fiduciary relationships. It is likely that this has been influenced by the Canadian tendency to emphasise the requirements of a power–dependency relationship and vulnerability when defining what constitutes a fiduciary relationship. In addition, fiduciary duties tend to be prescriptive and the courts more readily recognise that fiduciary law may protect both economic and ‘human and personal interests.’

The different treatment of non-economic interests in Australian and Canadian fiduciary law can be seen in a number of contexts. In the context of protecting the interests of indigenous people, Australian courts, unlike Canadian courts, have been reluctant to apply fiduciary law where the harm claimed is non-economic — for example, the psychological harm and loss of familial and cultural associations claimed in Stolen Generation cases. In relation to the issue of whether a patient has a right to access their medical records, Canadian fiduciary law recognises that a doctor has a fiduciary obligation to provide access in some circumstances, whereas Australian courts are reluctant to


12 Paramasivam (1998) 90 FCR 489, 504–5 (Miles, Lehan and Weinberg JJ); Joyce, above n 1, 246.


17 See Guerin v The Queen [1984] 2 SCR 335.


recognise that such a fiduciary obligation exists. The different approaches taken by Australian and Canadian courts to fiduciary cases involving non-economic interests may be viewed as an inadequacy of Australian fiduciary jurisprudence. This inadequacy is frequently seen in the context of sexual abuse cases.

B Feminist Critique

The failure of Australian fiduciary claims based on non-economic interests systematically removes certain advantages of bringing a fiduciary claim from the reach of sexual abuse victims, who are overwhelmingly women. For example, while delay in bringing a tort action may result in the action being statutorily barred, a statutory limitation period does not generally apply to fiduciary actions. Although the defence of laches may bar fiduciary relief, its application to fiduciary claims tends to be more generous when compared with actions to which limitation statutes apply. The inability of sexual abuse victims to access this advantage of fiduciary claims is problematic because such plaintiffs typically suppress their memories of the abuse and do not realise their symptoms are related to the abuse until well after the expiry of the statutory limitation period.

The conceptual advantage of a fiduciary action based on sexual abuse is also denied to plaintiffs when the courts refuse protection of non-economic interests in fiduciary law. In some cases, fiduciary law better captures particular aspects of the wrong compared with tort or contract law. For example, while some aspects of childhood sexual abuse are adequately captured by tort law through sexual assault and battery, other aspects of the abuse, in particular situations,
are better captured by fiduciary law. All instances of such abuse are heinous wrongs. This observation is not diluted by recognising that certain aspects of sexual exploitation by a parent or guardian of their child are different from the violation of a child by a stranger. However, incest typically has distinct features. For example, the abuse occurs over a long period of time, the parent manipulates and gradually sexualises almost all aspects of their relationship with the child, and, as the child becomes aware of the wrongfulness of the conduct, the parent ensures the child’s silence, for example, through inducements and threats. Unlike a parent or guardian, a stranger is not in the same position of trust and does not have the same ability to access and manipulate the child. Thus, in general, the wrong of sexual abuse committed by a stranger is adequately captured by tort — it does not usually involve the additional fiduciary dimensions of sexual exploitation in a parent–child or guardian–child relationship. In the latter context, concurrent liability in tort and fiduciary law is preferable. This would facilitate a more comprehensive recognition of the dimensions of the wrong and, as a result, assist sexual abuse victims to better access the therapeutic benefits of bringing proceedings against their abuser.

Inadequate recognition of the harm, through denial of its fiduciary dimension, may reinforce the victim’s feelings of exploitation by people in positions of authority.

The use of ‘gender neutral’ principles to confine fiduciary actions to cases involving economic interests tends to conceal the possibility that women plaintiffs may be systematically disadvantaged. The courts often give inadequate recognition to the social and policy contexts which influence the construction of facts and legal issues. For example, insufficient attention is given to the gendered nature of sexual violence when the legal inquiry is concerned with

28 See M(K) [1992] 3 SCR 6, 61–2, 68–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ); 86 (McLachlin J); Factum of LEAF, ‘M(K) v M(H)’, above n 27, 383–5; J(LA) (1993) 102 DLR (4th) 177, 188 (Rutherford J); Joyce, above n 1, 262.
29 Joyce, above n 1, 261.
30 See especially M(K) [1992] 3 SCR 6, 82 (L’Heureux-Dubé J), 86 (McLachlin J). See also at 61–2, 68–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ); J(LA) (1993) 102 DLR (4th) 177, 188 (Rutherford J); Joyce, above n 1, 261; Flannigan, above n 26, 306; Des Rosiers, above n 1, 203.
32 Joyce, above n 1, 262.
33 Cowie, above n 27, 376.
34 Elizabeth Sheehy, ‘Compensation for Women Who Have Been Raped’ in Julian Roberts and Renate Mohr (eds), Confronting Sexual Assault: A Decade of Legal and Social Change (1994) 205, 205.
whether there is any ‘subject matter’ to which fiduciary duties can attach.\textsuperscript{38} A further example may be found in \textit{Paramasivam}, where the possibility of a fiduciary action based on non-economic interests was positioned as the ‘other’ novel action,\textsuperscript{39} while actions based on economic interests fell within ‘conventional legal reasoning’ and were legitimate.\textsuperscript{40} Neutral language and principles, utilised in cases such as \textit{Paramasivam}, subordinate the need to consider the impact of courts’ decisions on the overwhelmingly female victims of sexual assault.\textsuperscript{41} The admirable rhetoric — that fiduciary principles protect the vulnerable by preventing the fiduciary from self-interestedly using its position of trust\textsuperscript{42} — further diverts attention away from the difficulties experienced by women plaintiffs.

The presentation of the ‘facts of the case’ and ‘the law’ as absolute truths often excludes women’s perspectives.\textsuperscript{43} By deconstructing the factual and legal narratives in fiduciary law decisions, it is possible to reveal stereotypical assumptions about women.\textsuperscript{44} This was exemplified in \textit{Norberg v Wynrib} (‘\textit{Norberg}’), in which the majority held there was no fiduciary breach.\textsuperscript{45} In particular, aspects of the narrative of Sopinka J were similar to the ‘stock story’ in \textit{Louth v Diprose} (‘\textit{Louth}’),\textsuperscript{46} in which the woman was characterised as a femme fatale who manipulated and exploited the feelings of infatuation suffered by the powerless man.\textsuperscript{47} This factual construction silenced an alternative narrative of continued sexual harassment of a woman, who was struggling financially, by a well-educated and wealthy man. The woman had also suffered depression due to the breakdown of her marriage and as a result of a brutal rape.\textsuperscript{48} Similar to the dominant narrative in \textit{Louth}, Sopinka J presented the claimant as the seducer and manipulator. For example, Sopinka J found that the patient played on the loneliness of the doctor to get what she wanted, that the doctor was impotent and never used any physical force, and that the patient consented to the sexual acts.\textsuperscript{49}


\textsuperscript{39} (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ).

\textsuperscript{40} Ibid.

\textsuperscript{41} See Graycar and Morgan, \textit{The Hidden Gender of Law}, above n 2, 356; Boyle, above n 2; Howe, above n 1, 61–2; Graycar and Morgan, ‘Disabling Citizenship’, above n 2, 65.


\textsuperscript{43} Sarmas, ‘Uncovering Issues of Sexual Violence in Equity and Trusts Law’, above n 1, 209; Otto, above n 37, 818, 823.

\textsuperscript{44} Sarmas, ‘Uncovering Issues of Sexual Violence in Equity and Trusts Law’, above n 1, 210; Otto, above n 37, 823–5; Davies, above n 37, 336–7. See generally Lisa Sarma, ‘Storytelling and the Law’, above n 35.

\textsuperscript{45} [1992] 2 SCR 226, 246 (La Forest J for La Forest, Gonthier and Cory JJ), 312–13 (Sopinka J).

\textsuperscript{46} \textit{Diprose v Louth [No 2]} (1990) 54 SASR 450; affd (1992) 175 CLR 621.


\textsuperscript{48} Ibid 719. See, eg, \textit{Diprose v Louth [No 2]} (1990) 54 SASR 450, 480–1 (Matheson J).

In contrast, the minority judges, who found there was a fiduciary breach, emphasised that the doctor was a professional, well-educated man who had exploited his younger and less knowledgeable patient. The patient was ill with an uncontrollable addiction and had ‘begged’ him for help.

III AMICI CURIAE AND M(K)

A Amici Curiae

Amici curiae may play a valuable role in appropriately responding to the practical and conceptual difficulties created by the lack of protection of non-economic interests by Australian fiduciary law. Under the traditional view of adversarial litigation, an amicus is viewed as an impartial individual who advises on the interpretation and status of the law in the interests of justice, rather than as an advocate for any party to the proceedings. In Australia, unlike interveners, amici do not formally join proceedings as parties. Amici are restricted to addressing the court on an issue on which the court will be assisted and it is doubtful that amici can tender evidence, call witnesses or cross-examine them. An amicus may be heard whenever the court thinks it is proper and in the interests of justice. Furthermore, the extent of their participation in proceedings is within the discretion of the court. In practice, amici are not frequently included in Australian litigation.

In Canada, ‘intervener’ is often used as a broad term which includes amici curiae. Intervention is allowed for the purpose of rendering assistance to the court by way of argument. As in Australia, the court has a broad discretion to decide whether to appoint an intervener and the extent of its participation in

51 Ibid 270.
54 Corporate Affairs Commission v Bradley (1974) 1 NSWLR 391, 396 (Hutley JA); United States Tobacco Co v Minister for Consumer Affairs (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ); R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis (1954) 90 CLR 55, 69 (Kitto J); Williams, above n 4, 368.
56 Ibid.
59 Williams, above n 4, 365, 386; Roxon and Walker, above n 53, 112; Kenny, above n 53, 160.
60 See, eg, Rules of the Supreme Court of Canada 2002 (C) r 92; Rules of Civil Procedure 1990 (O) rr 13.02–03.
61 See, eg, Rules of Civil Procedure 1990 (O) rr 13.02–03.
Compared with Australia, intereners play a more frequent and significant role in Canadian courts, including where societal interests are central to the case. For example, in Canada the Women’s Legal Education and Action Fund (‘LEAF’) is readily permitted to intervene on behalf of women in litigation. Important aims of LEAF are ‘to participate in litigation that promotes equality for women and to educate the public about this litigation and its relationship to women’s equality.’

B Intervention in M(K)

1 Fiduciary Breach

The intervener in M(K) influenced both the conclusion that there was a fiduciary breach based on the sexual abuse by the parent of his child and the Court’s sophisticated approach to the relevance of the appellant’s delay in instituting proceedings. LEAF was permitted to intervene because it brought ‘a special perspective’ to the proceedings. LEAF was also allowed to file material comprising studies and expert reports. Relying on much of this material, La Forest J undertook a detailed consideration of the dynamics of incest. La Forest J’s judgment was delivered jointly with Gonthier, Cory and Iacobucci JJ and the other judges largely agreed with him. His Honour observed that the incidence of incest was ‘alarming and profoundly disturbing’, with the damages ‘often manifesting themselves slowly and imperceptibly’ so that victims often only realised the harms suffered and their cause long after the action had been ostensibly barred by the limitations statute. This reflected the observations made in LEAF’s factum. Further arguments and academic material provided by LEAF were found in La Forest J’s description of the secrecy conditioning of the abuse, which typically arose through threats, inducements and exploitation of the child’s trust, and the child’s consequent fear of disclosing the abuse. In analysing this secrecy conditioning, it was impossi-
ble to ignore the social context in which childhood sexual abuse was a powerful taboo that reinforced the silence of incest survivors.\textsuperscript{75} This reflected the intervener’s argument that incest was a pervasive yet largely hidden problem.\textsuperscript{76} Another observation regarding the dynamics of incest, which was common to La Forest J’s judgment and LEAF’s factum, was that incest typically resulted in the child feeling guilt, shame and a sense of responsibility for the wrongdoing.\textsuperscript{77} These emotions, the other behavioural patterns, and the long-term psychological and emotional harm suffered by incest victims were commonly called ‘post-incest syndrome’. This syndrome has been described by LEAF and La Forest J as involving symptoms such as dissociation, denial and repression.\textsuperscript{78} Other injuries commonly comprise of depression, self-mutilation, eating disorders, sleep disturbances, substance abuse, sexual dysfunction, inability to form intimate relationships, tendencies towards promiscuity and prostitution, and vulnerability towards revictimisation.\textsuperscript{79} In \textit{M(K)}, the claimant’s symptoms were consistent with post-incest syndrome and provided ‘ample evidence’ of the ‘extremely debilitating’ effects of her abuse.\textsuperscript{80}

Following the detailed consideration of the dynamics of incest, the Court held that it was ‘intuitively apparent’ that the parent–child relationship was fiduciary in nature and that the sexual assault of one’s child was a fiduciary breach.\textsuperscript{81} A parent was found to have a positive duty to act in their child’s best interests.\textsuperscript{82} The Court’s conclusions regarding a clear fiduciary relationship and breach were likely supported and partly legitimised by the intervener’s detailed description of the fiduciary features of the parent–child relationship and how fiduciary law could uniquely capture certain aspects of the sexual exploitation of such a relationship of dependency and trust. For example, reflecting the arguments of LEAF,\textsuperscript{83} the Court held that in the parent–child relationship the child was peculiarly vulnerable to and was undoubtedly at the mercy of the parent, who exercised great power over their child’s daily life and welfare.\textsuperscript{84} In recognising

\begin{quote}
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
See especially Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 378, citing \textit{Subbings v Webb} [1991] 3 All ER 949. See also Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 364, 372, 377.
\end{quote}

\begin{quote}
\textit{M(K)} [1992] 3 SCR 6, 27, citing Finkelhor and Browne, above n 74, 532. See also, Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 369–71, citing Finkelhor and Browne, above n 74, 532.
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
\textit{M(K)} [1992] 3 SCR 6, 28 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ), citing: Carolyn B Handler, ‘Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle’ (1987) 15 \textit{Fordham Urban Law Journal} 709, 716–17. See also \textit{M(K)} [1992] 3 SCR 6, 35–6 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ), citing: Lamm, above n 78, 2194–5; Summit, above n 74. Factum of LEAF also cited the same sources: Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 369–72.
\end{quote}

\begin{quote}
\textit{M(K)} [1992] 3 SCR 6, 28 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\end{quote}

\begin{quote}
Ibid 61–2.
\end{quote}

\begin{quote}
\end{quote}

\begin{quote}
Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 383–4.
\end{quote}

\begin{quote}
\textit{M(K)} [1992] 3 SCR 6, 64 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\end{quote}
that such characteristics supported a presumptive fiduciary relationship between a parent and their child, the Court relied on supporting obiter in prior cases and academic commentary, all of which were cited in LEAF’s factum in support of the same conclusion. In addition, the argument of LEAF that a child’s physical or psychological integrity should be protected by fiduciary law was reflected in the Court’s view that the non-economic interests of an incest victim were ‘particularly susceptible to protection’ from equity. This was because to deny relief based solely on the nature of the interests involved and to protect material, but not ‘human and personal interests’, would have been extremely arbitrary.

While it may be going too far to assert that intervenor evidence directly resulted in changes to legal doctrine in M(K), the intervenor likely contributed to a more generous view of fiduciary principles with respect to non-economic interests. The Court’s conclusion that incest was a clear fiduciary breach, despite the non-economic interests involved, was partly based on material and arguments provided by the intervener. Furthermore, in decisions such as M(K), it was possible that intervenor evidence not only assisted the courts to sensitively recognise the feminised issues in individual fiduciary law cases, but intervention may also have resulted in a better informed judiciary, which perceived feminised issues as common knowledge rather than novel. This was arguably demonstrated by the M(K) Court’s use of language, such as ‘intuitively apparent’, when holding that incest was a fiduciary breach. This also appears to be confirmed in the case of J(LA) v J(H) (‘J(LA)’). In J(LA), Rutherford J, approving La Forest J’s view in M(K), thought that ‘[n]o detailed analysis’ was required to find that the parent–child relationship was fiduciary in nature. Notably, in J(LA) no intervener participated, yet a fiduciary relationship and its breach, based on sexual abuse, were found with little difficulty. Perhaps there was no need for the judiciary to be further informed about the fiduciary dimensions of sexual abuse in particular contexts, which were ‘intuitively apparent’ rather than novel. Even when expressing concerns about the expansiveness of Canadian fiduciary law, McEachern CJ in A(C) v Critchley (‘Critchley’) had ‘no doubt everyone charged with responsibility for the care of children … [is] under a fiduciary duty’. If intervenor evidence had not been admitted in cases such as

86 Factum of LEAF, ‘M(K) v M(H)’, above n 27, 385. See also at 383–4.
88 M(K) [1992] 3 SCR 6, 64 (La Forest J for La Forest, Gonthier and Iacobucci JJ).
89 Frame v Smith [1987] 2 SCR 99, 143 (Wilson J), quoted with approval in the case. See also Factum of LEAF, ‘M(K) v M(H)’, above n 27, 384.
90 See generally Manfredi, above n 64, 150–3, 178.
91 See ibid.
92 M(K) [1992] 3 SCR 6, 61–2 (La Forest J for La Forest, Gonthier and Iacobucci JJ).
94 Ibid 183.
95 Ibid 182–4, quoting M(K) [1992] 3 SCR 6, 61–2, 64 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
96 (1998) 166 DLR (4th) 475, 482.
2 Delay

The interpretation of the facts by the Court in M(K) was strongly influenced by a sophisticated and contextualised analysis of the legal relevance of the claimant’s delay. While the fiduciary claim was not governed by the limitations statute, the Court’s comments in relation to the limitation period, as it applied to the concurrent tort claim, showed a sensitive treatment of the issue. There were sound reasons why a strict application of the traditional and, in some cases, old-fashioned rationales for limitation periods was inappropriate in light of the circumstances of childhood sexual abuse.

First, the rationale that it may have been oppressive to defendants to allow actions to be brought long after the relevant events had passed was unpersuasive in the incest context. This was because there was ‘absolutely no corresponding public benefit in protecting individuals who perpetrate[d] incest from the consequences of their wrongful actions … while the victim continue[d] to suffer the consequences’. The same argument was made by the intervener in support of its view that the limitation period should not be strictly applied.

Secondly, the Court gave little weight to the concern that substantial delay may have resulted in loss or deterioration of evidence because in incest cases the evidence was often stale, even under the most expedient trial process. Damages from incest typically manifested themselves slowly and imperceptibly so that victims often realised the harms suffered and their cause long after the expiry of the limitation period. This reflected LEAF’s argument and evidence provided in support of the same conclusion. In addition, the Court held that the loss of corroborative evidence was not normally a concern in incest cases, since the typical case involved direct evidence from the parties.

Thirdly, the argument that the public had an interest in the quick settlement of disputes so that people could arrange their affairs without pending stale claims was ‘particularly inapposite’ in the incest context. Important to this conclusion was that incest claims often became ostensibly stale as a direct result of the defendant’s misconduct. This reflected the arguments made by LEAF. The

97 M(K) [1992] 3 SCR 6, 59 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
99 M(K) [1992] 3 SCR 6, 29–33 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
100 Ibid 29.
101 Ibid.
102 Factum of LEAF, ‘M(K) v M(H)’, above n 27, 374.
103 M(K) [1992] 3 SCR 6, 17, 28, 30, 35–6 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
104 Factum of LEAF, ‘M(K) v M(H)’, above n 27, 364, 370–3, 369–72, 374.
105 M(K) [1992] 3 SCR 6, 30 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
106 Ibid 31.
108 Factum of LEAF, ‘M(K) v M(H)’, above n 27, 374–5, discussing R v L(WK) [1991] 1 SCR 1091.
secrecy conditioning, which typically characterised incest,\textsuperscript{109} directly contributed to the victim only realising the harms suffered, and their cause, long after the civil action had ostensibly become stale.\textsuperscript{110} In this context, a sexual abuser should not be permitted to rely on public interest arguments to take advantage of the plaintiff’s delay, which the abuser themselves may have caused.\textsuperscript{111}

Given the reasons for not strictly applying the statutory limitation period, the Court in \textit{M(K)} espoused a ‘reasonable discoverability’ test to take into account the specific circumstances of incest.\textsuperscript{112} The time for bringing the tort claim began to run when the victim was reasonably capable of discovering the wrongful nature of the defendant’s acts and understood the nexus between the abuse and harm caused to them.\textsuperscript{113} The majority also held that there was a rebuttable ‘therapeutic presumption’ that an incest victim with post-incest syndrome did not discover the nexus until they began therapy.\textsuperscript{114} The Court’s application of the reasonable discoverability test, designed to take into account the specific circumstances of incest, gave rise to a different narrative from that implied by the traditional rationales for limitation periods. Instead of viewing the appellant’s delay and lack of evidence as undermining her claim, La Forest J held that there was overwhelming evidence that the appellant did not make the necessary link between the abuse and the harm suffered until she received therapy.\textsuperscript{115} The respondent’s evidence to the contrary was ‘entirely speculative.’\textsuperscript{116} Based on the range of material on the dynamics of sexual abuse, much of which was supplied by the intervener,\textsuperscript{117} the facts showed that the appellant was a typical incest survivor and her experiences closely corresponded to post-incest syndrome.\textsuperscript{118}

\textbf{IV RATIONALES FOR INCREASED AMICUS PARTICIPATION}

\textit{A Improvement of Fiduciary Law}

The beneficial role played by the intervener in \textit{M(K)} demonstrates that there are sound reasons for allowing more frequent amicus participation in Australian courts. Greater participation may facilitate a more expansive development of fiduciary principles with respect to non-economic interests. Increased amicus

\textsuperscript{109} \textit{M(K)} [1992] 3 SCR 6, 26–7 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ), citing: Gelin as, above n 74, 313–14; Summit, above n 74, 181; Finkelhor and Browne, above n 74, 532. See also Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 369–70, citing Summit, above n 74, 181–2; Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 371–2, citing Gelin as, above n 74, 315–23; Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 369–71, citing Finkelhor and Browne, above n 74, 532.

\textsuperscript{110} \textit{M(K)} [1992] 3 SCR 6, 17, 31 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ); Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 371–2.

\textsuperscript{111} \textit{R v L(WK)} [1991] 1 SCR 1091, 1101 (Stevenson J), discussed in \textit{M(K)} [1992] 3 SCR 6, 31–2 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ); Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 375.

\textsuperscript{112} \textit{M(K)} [1992] 3 SCR 6, 35–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).

\textsuperscript{113} Ibid 35.

\textsuperscript{114} Ibid 47–8.

\textsuperscript{115} Ibid 49.

\textsuperscript{116} Ibid.

\textsuperscript{117} See above nn 71–80 and accompanying text.

\textsuperscript{118} \textit{M(K)} [1992] 3 SCR 6, 48–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
participation could achieve this through better informing judges of the policy and social contexts surrounding both the facts of individual cases and the legal issue of whether there is a fiduciary breach. 119 In broad terms, the role of the amicus would not be to submit factual evidence relevant to the particular case, but rather to make legal arguments and provide information of a social and general statistical or factual nature. 120 For example, an amicus could present arguments as to why fiduciary law better captures the nature of the wrong of sexual abuse in particular contexts and better names the resulting harm. 121

By providing information on the social and policy implications of denying protection of non-economic interests, 122 amici may facilitate a greater willingness by the courts to consider the social impact of their decisions and a more sensitive development of fiduciary principles with respect to non-economic interests. 123 For example, in M(K) LEAF argued that the statutory limitation period disproportionately barred women’s claims. 124 While this constitutionally based argument was left unresolved, it may have encouraged the Court to consider the social impact of its decision, as exemplified by La Forest J’s obiter support for limitations law reform in the context of incest. 125 Further examples of La Forest J’s consideration of the wider social context were his Honour’s observation that society had imposed duties on parents to care for their children’s welfare, 126 and his Honour’s recognition that the community may have attached a taboo status to sexual abuse victims which discouraged them from suing their abusers. 127 Importantly, these observations reflected the intervener’s arguments.

In addition, amicus participation could help to legitimise judges’ decisions regarding the application and incremental development of fiduciary principles to


120 See, eg, Factum of LEAF, ‘M(K) v M(H)’, above n 27, 383–5, citing: Follis v Albemarle (1941) 1 DLR 178; Henderson v Johnson (1956) 5 DLR (2d) 524, 533 (LeBel J); LAC Minerals Ltd v International Corona Resources Ltd [1989] 2 SCR 574, 606 (Sopinka J); Shepherd, above n 85, 30. M(K) [1992] 3 SCR 6, 66 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ) cited the same sources. See also Factum of LEAF, ‘M(K) v M(H)’, above n 27, 384, citing Frame v Smith [1987] 2 SCR 99, 143 (Wilson J). See generally above Part III(B)(1).


123 See Factum of LEAF, ‘M(K) v M(H)’, above n 27, 367–9; M(K) [1992] 3 SCR 6, 24–5 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).

124 M(K) [1992] 3 SCR 6, 24–5, 49 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).

125 Ibid 62.

protect non-economic interests. By providing independent, expert information on legal and contextual issues, amicus briefs could assist a court to demonstrate that it has comprehensively and sensitively considered the social impact of its decision. Amicus briefs may provide an objective basis upon which judges can methodically take into account structural issues of gender and inequality in fiduciary cases involving non-economic interests. For example, the willingness of La Forest J in *M(K)* to espouse a therapeutic presumption in favour of certain incest victims was expressly based on and legitimised by scientific evidence establishing post-incest syndrome. A significant part of the material referred to by La Forest J in support of the syndrome was found in LEAF’s factum. Regardless of the merits of the presumption, the reasoning of La Forest J demonstrated that intervener evidence was capable of legitimising and facilitating the development of legal principles.

Furthermore, the use of amicus briefs to assist decision-making is consistent with, and required by, procedural fairness principles, including the need for decision-makers to be unbiased and appear to a reasonable observer to be unbiased. The lack of protection of non-economic interests in Australian fiduciary law systematically disadvantages women in particular contexts. The reasonable observer would think that decision-makers, in developing the law, appear to be biased. In addition, actual gender bias may be a systemic problem within the judiciary. Frequent amicus participation would help to satisfy procedural fairness as it would demonstrate, at least to the reasonable observer, that the decision-maker was made aware of gender issues and other potential social consequences of their decision.

Amicus briefs could facilitate the telling of an outsider’s story, which may challenge dominant factual and legal discourses, and thus assist in transforming the law so that it is more responsive to outsider groups. The construction of stock stories, which stereotype women, may determine both specific case

---

129 Roxon and Walker, above n 53, 112.
130 See generally Blokland, above n 119.
132 Ibid 27–8, 35–6 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ). For the sources which were cited by both the Court in *M(K)* and in Factum of LEAF, ‘*M(K)* v *M(H)*’, above n 27, 369–72, see generally above nn 71–80 and accompanying text.
134 Roxon and Walker, above n 53, 113; Law Reform Commission, above n 64, pt 2, 116.
135 See above Part II(B).
137 Senate Standing Committee on Legal and Constitutional Affairs, above n 136, 72–4.
outcomes and the development of doctrine.\textsuperscript{140} Thus, by disrupting and offering an alternative to the dominant narrative, amici could contribute to progressive legal change. When considering this process of fragmentation, it is important to recognise that the ability of amici to contribute to progressive change in fiduciary law depends upon judges’ willingness to listen to alternative narratives and their ability to empathise with them.\textsuperscript{141} Even if amicus briefs are routinely admitted in litigation, the courts would have no duty to allow amicus evidence to influence decisions regarding the interpretation of the facts, the application of fiduciary principles to individual cases or how fiduciary law should be developed.\textsuperscript{142} For example, in \textit{Norberg} aspects of Sopinka J’s decision reflected stereotypes about women, despite intervention by LEAF.\textsuperscript{143} Existing gender bias may possibly be so entrenched in the judiciary that the application and development of fiduciary principles will continue to reflect this bias.\textsuperscript{144} There is certainly sufficient flexibility and discretion in equity for this result.\textsuperscript{145}

On the other hand, the flexibility and innovative nature of equity may be seen as strengths and as providing the very reason why amici could ameliorate gendered oppression.\textsuperscript{146} The observation that the construction of judicial narratives influences legal outcomes means that there is potential for an interpretation of equitable doctrines which recognises substantive inequality based on gender.\textsuperscript{147} With the assistance of amici, the language of fiduciary law, which sometimes speaks of protecting the vulnerable principal from the abuse by the fiduciary of its position of power, has potential to yield such an interpretation.\textsuperscript{148} For example, the conclusion of the Court in \textit{M(K)} that fiduciary law better captured certain dimensions of incest was consistent with the overall view of the intervener.\textsuperscript{149} The conclusion was also partly influenced by the intervener’s detailed description of the fiduciary features of the parent–child relationship, including the peculiar vulnerability of the child at the mercy of the more powerful parent.\textsuperscript{150}

\textsuperscript{140} Sarmas, ‘Storytelling and the Law’, above n 35, 703.
\textsuperscript{141} Ibid. See also Andrew Koshner, \textit{Solving the Puzzle of Interest Group Litigation} (1998) 100–1; Therese Henning and Simon Bronitt, ‘Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence’ in Patricia Easteal (ed), \textit{Balancing the Scales: Rape, Law Reform and Australian Culture} (1998) 76, 93.
\textsuperscript{142} Williams, above n 4, 376.
\textsuperscript{143} See above nn 46–9 and accompanying text.
\textsuperscript{145} Otto, above n 37, 825.
\textsuperscript{146} See generally ibid.
\textsuperscript{147} Ibid 825.
\textsuperscript{149} [1992] 3 SCR 6, 24 (La Forest J for La Forest, Cory and Iacobucci JJ).
\textsuperscript{150} See Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 383–4. See further above Part III(B)(1).
In practice, there is evidence that amicus briefs influence decisions. In Canada, LEAF has successfully influenced both individual case outcomes and legal doctrine. For example, in Canadian Supreme Court cases between 1988 and 2000, LEAF submitted arguments on 50 separate issues. The conclusion of the Court regarding 70 per cent of these issues was consistent with the position supported by LEAF. In Australia, the slight increase in amicus participation in the High Court from 1992 coincided with a more creative period in the work of the Court in the area of rights jurisprudence.

B Consistency with General Principles of Equity

Allowing more amicus evidence would be consistent with the general principles and underlying concepts of fiduciary law and equity. One such concept is that equity protects weaker parties against stronger parties. This concept is reflected in the observation that fiduciary law does not assume all people are autonomous units with equal bargaining power. Another example of this concept is that fiduciary law is sometimes said to protect the more vulnerable principal where the fiduciary exercises its power in relation to the principal. It would be consistent with the notion of protecting the more vulnerable party to admit amicus evidence in litigation because such evidence could assist women plaintiffs in the sexual abuse context.

Furthermore, equity’s protection of the weak against the more powerful historically involved the assistance of women, who were often oppressed by common law property rules. Today, this notion is reflected in the ‘wife’s equity’ which, at least theoretically, is intended to assist women. A more generous approach to admitting amicus evidence would facilitate the need to ensure that equity provides sensitive and contextualised assistance to women. Developments such as the wife’s equity show that there is sufficient flexibility in equity to incorporate gender based policy considerations where women are disempowered. Fiduciary law has this same flexibility to incorporate such considerations in cases involving non-economic interests. If the law is developed

152 Manfredi, above n 64, 33, 150–3; Factum of LEAF, Equality and the Charter, above n 66, xxv; Law Reform Commission, above n 64, pt 2, 120–2.
153 Manfredi, above n 64, 18, Table 1.2.
154 Ibid 20.
155 Ibid.
156 Williams, above n 4, 386.
156 Loughlan, above n 157, 10–11; Denis Browne (ed), Ashburner’s Principles of Equity (2nd ed, 1933) 177–8.
with the assistance of amici and perceived to be responsive to women’s perspectives, then this could encourage more women plaintiffs to bring sexual abuse claims and allow equity to come to the assistance of more women.162

In addition, increased amicus participation would be consistent with the idea that the more flexible equitable jurisdiction was developed to mitigate both the substantive and procedural rigidity of the common law.163 Equity’s historical procedural flexibility is demonstrated by a comparison of the equitable pleadings process with the common law process in the 12th and 13th centuries. At that time, every common law action had to be commenced by an original writ in prescribed form.164 If a claim did not fit within an established writ, the claim could not be heard.165 When the equitable jurisdiction of the Court of Chancery first developed, there was an informal application process where petitioners could seek relief in particular circumstances, including where the common law was inadequate or defective — for example, because of the restricted variety of common law writs which were mandated for initiating common law actions.166 Equity’s procedural flexibility is further exemplified by the lack of a precedent system in its early stages of development before the mid 17th century.167 It is true that, over time, equity has hardened compared with its origins of profound fluidity, informality and conscience-based decision-making.168 Nevertheless, these notions continue to be relevant to contemporary decision-making.169 For example, Kirby P, dissenting in Breen, observed that there is some judicial tendency in Australia to adopt a less rigid view of amicus appearances.170 The well-established power of courts to allow intervention is regularly exercised in the US and increasingly exercised in Canada.171 Amici may provide assistance on general principles in test cases and to exclude such assistance manifests ‘the procedural formalism and rigidity which limits the utility of the courts’.172

An approach to amicus participation that is procedurally more flexible would be consistent with equity’s concern to mould equitable principles to the individ-


163 Loughlan, above n 157, 5, 9; Dal Pont and Chalmers, above n 10, 3. See also Otto, above n 37, 825–6.

164 Dal Pont and Chalmers, above n 10, 3.


166 Ibid 4.

167 Loughlan, above n 157, 4, 8.


171 Breen v Williams (1994) 35 NSWLR 522, 533 (Kirby P).

172 Ibid.
For example, as discussed above in Part II, while tort law adequately captures some aspects of sexual abuse, fiduciary law better captures other aspects of sexual abuse by a parent or guardian of their child. In these contexts, concurrent liability in tort and fiduciary law is preferable. Therefore, the aim of amicus participation would not be to facilitate the replacement of tort law with fiduciary law, but rather to allow an amicus to comprehensively inform the court of the multiple dimensions of the wrong involved and the relevant action, or combination of actions, which adequately captures the wrong. Such information would facilitate the recognition that different aspects of tort and fiduciary law could, in some contexts, be combined to more comprehensively and accurately name the harm of sexual abuse. This would enhance the ability of courts to mould legal principles to the individual circumstances of each case and challenge the seemingly arbitrary refusal to apply fiduciary principles to non-economic interests. By facilitating adequate recognition of the wrong, amicus participation would also support the therapeutic benefit to sexual assault victims of bringing a legal action against their abuser.

V Application to Australian Fiduciary Law: Paramasivam

A Fiduciary Breach

Given the analysis of the role of the intervener in M(K) discussed in Part III and the further benefits of increased amicus participation discussed in Part IV, some guidance can be obtained as to how an amicus could have assisted the Court in Paramasivam to reach a more contextually correct and favourable conclusion. In Paramasivam, the fiduciary claim, based on sexual abuse by a guardian of a child in his care, was held to have no real prospects of success. The Court accepted the apparent applicability of fiduciary principles to the respondent’s conduct. However, this did not establish a fiduciary action because there was an absence of economic interests and there was no need for fiduciary law to intervene where tort law applied. Such intervention, the Court reasoned,
would have been novel and involved an unjustified leap in conventional legal reasoning.\textsuperscript{183}

In the sexual abuse context, when courts hold that non-economic interests cannot give rise to a fiduciary action, the conceptual ability of fiduciary law to better capture certain aspects of the harm in particular situations is systematically denied to plaintiffs.\textsuperscript{184} In \textit{Paramasivam}, an amicus could have addressed this difficulty by informing the Court about the unique fiduciary features of sexual exploitation of the guardian–child relationship and argued that, compared with a guardian, a stranger was not in the same position of trust and did not have the same ability to access and manipulate the child.\textsuperscript{185} This may have encouraged the Court to at least consider the views that there may have been a need for fiduciary law to intervene in relation to particular dimensions of the sexual abuse, and that it was arbitrary to deny relief solely because the interests involved were non-economic.\textsuperscript{186} In this way, an amicus could have facilitated the telling of an alternative story which disrupted the dominant legal discourse and assisted in a more sensitive development of fiduciary law.\textsuperscript{187} For example, the conclusion of the Court in \textit{M(K)} that sexual assault in the parent–child relationship was clearly a fiduciary breach was supported and at least partly legitimised by the intervener’s detailed description of the fiduciary features of the relationship and how fiduciary law could uniquely capture certain aspects of the sexual exploitation of such a relationship.\textsuperscript{188}

A further problem in \textit{Paramasivam} was that the Court viewed the claimant’s largely non-economic harm — including post-traumatic stress disorder, ongoing psychiatric problems, anxiety and sexual difficulties — as insubstantial.\textsuperscript{189} In contrast, in \textit{M(K)} the intervener provided material regarding the features of post-incest syndrome,\textsuperscript{190} which included similar harms claimed by the appellant in \textit{Paramasivam}. In reliance on some of this material, the Court in \textit{M(K)} held that the claimant’s symptoms evidenced the ‘extremely debilitating’ effects of her abuse.\textsuperscript{191} In \textit{Paramasivam}, an amicus could have similarly provided evidence of the extremely debilitating harm caused by sexual abuse and challenged the view that the alleged non-economic harm was insubstantial. This may have facilitated recognition that fiduciary law should equally protect economic and non-economic interests.

\begin{itemize}
\item \textsuperscript{183} \textit{Paramasivam} (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ).
\item \textsuperscript{184} See above Part II(B).
\item \textsuperscript{185} See Joyce, above n 1, 262.
\item \textsuperscript{186} \textit{Frame v Smith} [1987] 2 SCR 99, 143 (Wilson J), quoted with approval in \textit{M(K)} [1992] 3 SCR 6, 64 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\item \textsuperscript{187} See above Part IV(A); Sarmas, ‘Storytelling and the Law’, above n 35, 703, 724–6.
\item \textsuperscript{188} See above Part III(B)(1).
\item \textsuperscript{189} (1998) 90 FCR 489, 512 (Miles, Lehane and Weinberg JJ). See also \textit{Paramasivam v Flynn} [1998] ACTSC 10 (Unreported, Gallop J, 2 March 1998) [36].
\item \textsuperscript{190} [1992] 3 SCR 6, 28 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ), citing Handler, above n 79, 716–17; \textit{M(K)} [1992] 3 SCR 6, 35–6 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ), citing: Lamm, above n 78, 2194–5; Summit, above n 74. Factum of LEAF cited the same sources: Factum of LEAF, ‘\textit{M(K)} v \textit{M(H)}’, above n 27, 369–72. See above nn 77–80 and accompanying text.
\item \textsuperscript{191} [1992] 3 SCR 6, 28 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\end{itemize}
Underlying the refusal of the Court in *Paramasivam* to recognise a fiduciary claim based on non-economic interests was perhaps a feeling that the case involved novel questions ‘which require[d] careful consideration in the light of changing social circumstances.’\(^{192}\) The Court may have been reluctant to make pronouncements on social circumstances without any objective evidence. An amicus could have provided information regarding the social context of childhood sexual abuse and assisted the Court to legitimise a decision which took this into account.\(^{193}\) In this way, not only could amicus participation have facilitated a better outcome in *Paramasivam* but, over time, it may also have resulted in a better informed judiciary. This judiciary may have recognised that it was ‘intuitively apparent’,\(^{194}\) rather than a leap in conventional reasoning,\(^{195}\) to hold that sexual assault by a guardian or parent of their child was a fiduciary breach even if non-economic interests were the subject matter of the action.

**B Delay**

When compared with the approach in *M(K)* to the appellant’s delay in bringing proceedings, the reasoning of the Court in *Paramasivam*, which refused to grant a time extension for the statutorily barred fiduciary claim,\(^{196}\) indicated that amicus participation may have assisted the Court to take a more sensitive approach to the claimant’s delay and lack of evidence. Unlike in *M(K)*, the traditional rationales for limitations statutes seemed to be applied in *Paramasivam* without alteration to take account of the particular circumstances of childhood sexual abuse.\(^{197}\) Thus, the relevant considerations were as follows: it may have been oppressive to a defendant to allow an action to be brought long after the relevant event had passed;\(^{198}\) delay may have resulted in important evidence deteriorating or disappearing;\(^{199}\) and it was in the public interest for disputes to be settled quickly so that people could arrange their affairs without pending litigation.\(^{200}\) In addition, Gallop J observed at trial that, because sexual matters occur in private and do not leave a verifiable documentary trail, sexual allegations are generally easy to fabricate and had been shown to be so through human experience in relation to women.\(^{201}\)


\(^{193}\) See above nn 119–29 and accompanying text.

\(^{194}\) *M(K)* [1992] 3 SCR 6, 61–2 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).

\(^{195}\) *Paramasivam* (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ).

\(^{196}\) See *Limitation Act 1985* (ACT) s 13(1); *Paramasivam* (1998) 90 FCR 489, 491, 504 (Miles, Lehane and Weinberg JJ).


\(^{201}\) See also *Paramasivam* (1998) 90 FCR 489, 495 (Miles, Lehane and Weinberg JJ).
With respect to each of the traditional rationales for limitation periods specified in *Paramasivam*, the Court in *M(K)*, partly assisted by intervener evidence, substantially modified the application of each rationale to take account of the particular circumstances of incest.\(^{202}\) Amicus evidence on the dynamics of childhood sexual abuse may have similarly assisted the *Paramasivam* Court to modify the application of the traditional rationales. An amicus could have argued that substantial delay and a lack of evidence, especially corroborative evidence,\(^{203}\) showed that the appellant’s claim was consistent with the typical childhood sexual abuse case, and that these features were probably directly caused by the nature of the respondent’s conduct.\(^{204}\) This may have facilitated a challenge to the Court’s view in *Paramasivam* that the lack of evidence, including corroborative evidence,\(^{205}\) was a barrier to the appellant’s action and indicated fabrication of the allegations.\(^{206}\) In addition, an amicus could have provided an alternative perspective to the Court’s rejection of the appellant’s argument — that his delay was contributed to by the respondent’s conduct — because the respondent’s conduct, relied upon in the appellant’s argument, comprised the cause of action.\(^{207}\) As the Court in *M(K)* recognised, and consistent with the intervener’s arguments,\(^{208}\) this factor should have been viewed in favour of the appellant,\(^{209}\) rather than against the appellant as concluded in *Paramasivam*.

Furthermore, in *Paramasivam* an amicus could have given evidence on the surrounding social context which, in *M(K)*, enabled La Forest J to consider the powerful taboo status attached to sexual abuse which reinforced victims’ silence after the abuse.\(^{210}\) In *Paramasivam*, amicus evidence on this feature of the social context of childhood sexual abuse, combined with evidence regarding the secrecy conditioning which often inhibits victims’ disclosure,\(^{211}\) would have supported the appellant’s explanation that he lacked the courage to take any steps until he learned about actions for similar wrongdoing through the media because of his shame about the sexual relationship.\(^{212}\) This may have challenged Gal-
lop J’s view that the appellant’s explanation did not warrant investigation due to the substantial delay in commencing proceedings.

The treatment of the appellant’s delay in *Paramasivam* shows that, where courts have limited access to information about gendered issues, inaccurate assumptions may be made which reflect the widespread belief that women fabricate sexual allegations. An amicus could have supported an alternative view regarding the significance of delay and the lack of evidence, and thus challenged the tendency in *Paramasivam* to resort to stock stories detrimental to women. By challenging the traditional rationales for limitation periods, and thus fracturing the dominant legal narrative, an amicus could have facilitated a more sophisticated application of the limitations statute. As demonstrated in *M(K)*, an amicus could have informed the Court in *Paramasivam* that childhood sexual abuse survivors often do not discover the nexus between the abuse and the harm caused until they begin therapy. This would have provided opposition to the inference in *Paramasivam* that the appellant’s lack of recognition that he had an illness, and his consequent failure to seek medical or legal help, indicated that the appellant was unlikely to have a disability and undermined his time extension application. Perhaps an amicus would have facilitated a similar view to the one taken by the Court in *M(K)*, that a ‘reasonable discoverability’ test was appropriate. The application of such a test, which took into account the individual circumstances of childhood sexual abuse, would have resulted in a different narrative in *Paramasivam*. Instead of undermining the appellant’s credibility, based on the delay in bringing proceedings and lack of evidence, the Court could have considered when the appellant made the necessary link between the abuse and harm suffered, and whether his experiences corresponded to amicus evidence regarding the common symptoms exhibited by childhood sexual abuse survivors. On the facts, the reasonable discoverability test was arguably only satisfied when the appellant realised that he had a psychiatric

---


214 See especially Des Rosiers, above n 1, 204–5. See also Graycar and Morgan, *The Hidden Gender of Law*, above n 2, 355–6; Senate Standing Committee on Legal and Constitutional Affairs, above n 136, 55; Mack, above n 119, 64–73. See *Question of Law Reserved on Acquittal Pursuant to Section 350(1A) Criminal Law Consolidation Act* (No 1 of 1993) (1993) 59 SASR 214, 216 (King CJ).

215 See generally above nn 43–51 and accompanying text. See also Des Rosiers, above n 1, 205.

216 See above Part IV(A).

217 See especially *M(K)* [1992] 3 SCR 6, 47–8 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ). The Court in *M(K)* cited the same sources as those cited in Factum of LEAF, ‘*M(K) v M(H)*’, above n 27, 374. See also at 369–72, citing: Handler, above n 79, 716–19; Lamm, above n 78, 2192–5; Summit, above n 74, 184–6. See further Des Rosiers, above n 1, 205; Marfording, above n 55, 250–2; Graycar and Morgan, ‘Disabling Citizenship’, above n 2, 70–1.


219 See *M(K)* [1992] 3 SCR 6, 35 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ). See also above nn 112–15 and accompanying text.

220 See *M(K)* [1992] 3 SCR 6, 48–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
illness after consultation with a doctor in the same year the proceedings were brought.\textsuperscript{221} The statutory limitation period would not have barred the action.

An additional aspect of the \textit{Paramasivam} case, which undermined the credibility of the appellant’s explanation for his delay, and which amicus evidence could have challenged, was Gallop J’s characterisation of the appellant’s attempted disclosure of the details of the case to the media as ‘deplorable’.\textsuperscript{222} In contrast, La Forest J in \textit{M(K)} observed that the appellant’s attempted disclosures were met with scepticism, denial and evasion, and did not undermine her claim.\textsuperscript{223} This was consistent with LEAF’s submission that a mishandled disclosure could have reinforced the conditioned silence caused by the sexual abuse and resulted in further psychological repression.\textsuperscript{224} If an amicus had made similar submissions in \textit{Paramasivam}, the Court may have been encouraged to adopt a similar view to the one taken by La Forest J in \textit{M(K)} that the appellant’s attempted disclosure did not undermine his credibility.\textsuperscript{225}

\textbf{VI Conclusion}

The complex and unique issues of non-economic interests which commonly arise in fiduciary claims are not being adequately addressed in Australia.\textsuperscript{226} The denial of protection by fiduciary law of non-economic interests arbitrarily removes important practical and conceptual advantages of bringing a fiduciary claim based on sexual abuse.\textsuperscript{227} Furthermore, the apparent gender neutrality of the dominant legal and factual discourses in fiduciary law decisions tends to conceal the systematic disadvantages experienced by women,\textsuperscript{228} who are overwhelmingly the victims of sexual violence.\textsuperscript{229} The case of \textit{Paramasivam} demonstrates that the current Australian approach to fiduciary law in relation to non-economic interests may, in some contexts, reflect inaccurate assumptions regarding women and other vulnerable sexual abuse victims and inadequately capture the complex dimensions of the wrong of sexual abuse.\textsuperscript{230} Several analogous aspects of the \textit{M(K)} decision demonstrate how amicus participation in \textit{Paramasivam} may have facilitated the fracturing of gendered narratives, encouraged a more contextualised and sensitive approach to the appellant’s

\begin{enumerate}
\item \textit{Paramasivam v Flynn} [1998] ACTSC 10 (Unreported, Gallop J, 2 March 1998) [80].
\item [1992] 3 SCR 6, 48 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\item Factum of LEAF, ‘\textit{M(K) v M(H)}’, above n 27, 372.
\item [1992] 3 SCR 6, 48–9 (La Forest J for La Forest, Gonthier, Cory and Iacobucci JJ).
\item See Joyce, above n 1, 266–7; Sarmas, ‘Uncovering Issues of Sexual Violence in Equity and Trusts Law’, above n 1, 215–18; Howe, above n 1, 70–5; Des Rosiers, above n 1, 202–7.
\item See Joyce, above n 1, 260–2; Howe, above n 1, 61–2; Graycar and Morgan, ‘Disabling Citizenship’, above n 2, 65–6, 68, 71; Flannigan, above n 26, 306. See generally Mathews, above n 25, 219–21.
\item See Graycar and Morgan, \textit{The Hidden Gender of Law}, above n 2, 356; Boyle, above n 2; Graycar and Morgan, ‘Disabling Citizenship’, above n 2, 65.
\end{enumerate}
2008] Fiduciary Law, Non-Economic Interests and Amici Curiae 1181

fiduciary claim, and highlighted the legal relevance of substantial delay in bringing such an action.

Allowing increased amicus participation in Australian courts may facilitate a more progressive development of fiduciary principles with respect to non-economic interests. Furthermore, increased participation is justified and required by the general principles and underlying concepts of fiduciary law and equity. Changing the rules regarding amicus evidence alone will neither immediately transform substantive fiduciary principles nor guarantee the elimination of gender bias within the law.231 However, amici curiae could play the important role of an outside storyteller, which facilitates the process of disrupting and challenging legal narratives to create a space for alternative perspectives.232

231 See Otto, above n 37, 825; Naffine, above n 144, 21–31; Young, above n 144, 456–62; Delgado and Stefancic, above n 144, 1933; Mack, above n 119, 64–73.