

Problem Gambling & Tort Law



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Agenda

- Can, or should, a duty of care be extended to problem gamblers?
 - Policy considerations
- How do we define “problem gamblers”?
- Even if there is a duty, what is the standard of care?
- Analysis of the defences available to the casino, or other gaming venue
 - *Volenti non fit injuria*
 - Contributory negligence
 - Illegality (*Ex turpi causa non oritur actio*)
- Damages
 - Recovery of pure economic losses

Duty of Care

- *Kamloops (City of) v. Nielsen*
(re-stated in *Odhavji Estate v. Woodhouse*)
 - (1) is there “a sufficiently close relationship between the parties” or “proximity” to justify imposition of a duty and, if so,
 - (2) are there policy considerations which ought to negative or limit the scope of the duty, the class of persons to whom it is owed or the damages to which breach may give rise?

Is the duty of care to problem gamblers analogous to intoxicated patrons?

Childs v. Desormeaux

- The Chief Justice, commenting on *Cooper v. Hobart*, stated:

“...[this is] the basic notion of precedent: where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise.

On the other hand, if a case does not clearly fall within a relationship previously recognized as giving rise to a duty of care, it is necessary to carefully consider whether proximity is established.”

Does problem gambling= intoxicated patrons?

- *Stewart v. Pettie*
 - “A duty of care exists between alcohol-serving establishments and their patrons who are unable to look after themselves after becoming intoxicated.”
- Can we make the analogy that problem gambling is akin to problem drinking?
 - Professor Jamie Cameron, and I, argue NO
 - Intoxication *may be* a one time event
 - Problem gambling is a mental / psychological condition
 - Cannot be discovered visually
 - Requires a long-term pattern of behaviour
 - Must be diagnosed by a trained clinician

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So, if is not analogous to intoxication, we have to look at proximity

- Proximity

- “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.” (*Donoghue v. Stevenson*)
- The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. (*Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165)

- Proximity

- “gaming industry does not and cannot control the risk of problem gambling;
- it cannot monitor the activities of problem gamblers because it cannot identify who they are; and
- it cannot prevent them from seeking and gaining access to other casinos or alternative games of chance.” (Professor Cameron)

But, what if there is a duty of care, and proximity...
are there policy considerations
that should negate the duty of care?

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Policy Considerations?

- Privacy
 - IF there is a duty of care owed to problem gamblers, then for casinos to properly fulfill their alleged duty of care, they would require a physician, psychologist, nurse, or social worker to analyze such patterns of behaviour and provide the casino with a preliminary diagnosis of **all suspected problem gamblers**.
 - Such health-care practitioners are considered to be health information custodians, and are subject to rights, duties, and obligations of the *Personal Health Information Protection Act, 2004*
- **Casinos would become ‘gatekeepers’ for society’s ills...** because **IF** we accept that problem gambling is akin to intoxication, then we **OUGHT** to accept that problem gambling is also akin to problem eating and perhaps even marital fidelity
 - Would casino’s owe a duty of care to patrons who visit the buffet too often?
 - Would casino’s owe a duty of care to patrons who have extra-marital affairs?

What is problem gambling?

The term has many possible meanings:

- “Compulsive gambling is a term that describes an impulse control disorder”
- “Pathological gambling is defined by the APA’s DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) as “a maladjusted practice characterized by persistent and repetitive playing that is present when patients meet five or more of the criteria in the DSM-IV-R[.]”
- “Self-identified problem gambler” is someone who has completed a “Request to be Placed on a List of Self-Excluded Persons and Release”.
 - Note, that a “self-identified problem gambler” does NOT NECESSARILY mean that this person is a compulsive gambler, or a pathological gambler.
 - Maybe you just feel that your gambling is ‘out of control’, or that it’s affecting your ability to pay for school, rent, etc.

Why are these distinctions important?

- Arguably, there it is conceptually easier to find a duty owed to “self-identified problem gamblers” than to unidentified problem gamblers.
- These distinctions will become important when we discuss the defenses to negligence.
- Presumably, the duty to a “self-identified problem gambler” would be rooted in contract law (i.e. it would be rooted in the self-exclusion release that the problem gambler signs with the casino).
 - Consider though that for a true “pathological gambler” (i.e. with a serious mental illness), is there any true consent in signing this release? Is there any consideration?

What if there is a duty of care?

- As I noted earlier, for self-identified problem gamblers it might be (conceptually) easier to find that a duty of care is owed to them... since it is easier to view them as being “neighbors”.
- Even if there is a duty of care, the question to be asked is... what is the standard of care
- *Stewart v. Pettie*

Tort law does not require the wisdom of Solomon. All it requires is that people act reasonably in the circumstances. The "reasonable person" of negligence law was described by Laidlaw J.A. in this way in *Arland v. Taylor*, [1955] O.R. 131 (C.A.), at p. 142:

He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct... **His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence."**

Standard of Care

- The standard of care would be that of “reasonable surveillance”
 - The law recognizes that humans are imperfect
 - If the casino – or other gaming venue – can demonstrate that it attempted to keep self-identified problem gamblers off its premises, then this should suffice
 - No surveillance system is 100% perfect

Defences

- *Volenti non fit injuria*
and the problem gambler
 - the problem gambler is implicitly consenting to the risks involved in his/her gambling. Having been placed on the self-exclusion list, any risk of ‘injury’ has been ‘understood’ by the problem gambler.
 - A problem gambler (but not a pathological gambler *per se*) has implicitly consented to the risks involved in gambling.

Defences

- *Volenti non fit injuria*
and the pathological gambler

- it could be argued that pathological gamblers (i.e. suffering from a ‘true’ mental illness) cannot be said to truly and fully appreciate the risks of their gambling.
- however, Justice Moreau in *R. v. Reshke*, [2004] A.J. No. 613 commented:

“I am satisfied that Mr. Reshke's gambling addiction [earlier testimony had identified Mr. Reshke as a “significant pathological gambler”] fueled the procurement card fraud and the creation of false contracts either directly or indirectly. **Having said that, although the offences were the products of an impulsive nature and were fueled by addictions, they cannot themselves be described as impulsive or spontaneous as they extended to a number of transactions over an extended period of time. His contract scheme [of awarding fraudulent consulting contracts, through his position in the Alberta government, to persons he was indebted to, or to gamble with] was deliberate, well-planned and repeated.**”

Contributory Negligence

- The self-identified problem gambler could also be said to contribute to any alleged negligence on the casino's part, by entering the gaming venue and continuing to gamble.
- The casino would (in a perverse way) only be negligent for failing to enforce the trespass of the problem gambler onto their premises.
- Any losses that the problem gambler incurs, would be as a result of his/her actions.
 - On some level, there ought to be *some* measure of responsibility of the part of the problem gambler (the earlier criminal jurisprudence appears to support this contention)
 - Problem gamblers do not become mindless automatons due to their illness

Illegality

Ex turpi causa non oritur actio

(from an immoral or illegal act an action does not arise)

- Since the self-identified problem gambler has committed a trespass, the law should not aid the problem gambler in recovering his/her losses since it would be unjustly enriching the problem gambler for their trespass.
- SCC in *Hall v. Herbert* curtailed the use of the doctrine where personal injuries have been sustained...
 - It is still applicable to the situation where the problem gambler has committed a trespass by entering the gaming venue (a civil and criminal wrong), loses money, and then seeks to recover purely economic losses from that illegal trespass.

Damages?

- Losses that a problem gambler will suffer can be characterized as “pure economic losses”.
 - Pure economic loss is loss suffered by an individual that is not accompanied by physical injury or property damage.
 - House of Lords has curtailed recovery of pure economic losses (due to the indeterminate nature of such losses).
- In *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, the SCC recognized five different categories of negligence claims for which a duty of care has been found with respect to pure economic losses:
 - 1. The Independent Liability of Statutory Public Authorities;
 - 2. Negligent Misrepresentation;
 - 3. Negligent Performance of a Service;
 - 4. Negligent Supply of Shoddy Goods or Structures;
 - 5. Relational Economic Loss.

- The only ground which is applicable to casinos – and other gaming venues – is the Independent Liability of Statutory Public Authorities (like the Ontario Lottery and Gaming Corporation) .
 - Perhaps relational economic loss might apply too for self-identified problem gamblers, since there is an underlying contract.
- Consider that all of the jurisprudence on the recovery of pure economic loss deals with negligent misstatements, negligent assessments (like the awarding of a contract to Party A instead of Party B) or the negligent performance of some act (like construction).
 - A casino – or other gaming venue – is NOT the cause of problem gambling per se... i.e. the casino did not CREATE the loss. It is the problem gambler who creates the loss
- Which raises another issue... a main ingredient for negligence is CAUSATION... can we say that casinos CAUSE problem gambling?
 - This would be akin to saying that the LCBO ‘causes’ alcoholism because it sells alcohol.
 - And now we’ve come full circle...
 - No Duty of Care
 - No Causation
 - No Recovery of Pure Economic Loss
 - Overriding Policy Considerations (like Privacy and the ‘Gatekeeper’ of Society’s Ills’ argument)

No Liability towards problem gamblers, under the law of torts.