REWARDING TRESPASS & OTHER ENIGMAS: THE STRANGE WORLD OF SELF-EXCLUSION & CASINO LIABILITY

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In this paper, the authors address many of the tortious and contractual issues associated with the liability of casinos to problem gamblers. The issues in tort are analyzed through the traditional elements of the action – duty of care, standard of care, proximity, and recognizable loss. Under contract law, the authors examine the problems associated with consideration and mental capacity when problem gamblers sign a contractual undertaking to be excluded from casinos and other gaming venues.

Many of the references cited in this work relate to the Province of Ontario because an earlier article (and report) on the issue of problem gambling posited that Ontario's gaming venues owed a duty of care to problem gamblers. However, many of the basic principles of contract law and tort law raised within this paper will be applicable throughout the Commonwealth and the United States.

I. INTRODUCTION

Problem gambling is a complex issue driven by emotive discourse. It pits gaudy, extravagant casinos, against "mentally ill" problem gamblers. Outside of the casino industry itself, there is often little sympathy for the casino. This paper seeks to address this imbalance by refuting the claim that problem gamblers have a viable claim in tort against casinos (and other gaming venues[1]). It also seeks to address the contractual liability, if any, of casinos to self-identified problem gamblers who have signed a voluntary self-exclusion agreement whereby the casino undertakes to exclude the problem gambler from its premises.[2]

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[1] For convenience, we use the term "casino" to mean traditional casinos, race tracks, bingos, and other gaming venues.

[2] Under Ontario's voluntary self-exclusion program, it is problem gamblers who self-identify and sign an undertaking, the "Request to be Placed on a List of Self-Excluded Persons and Release," that they wish to be excluded from all Ontario gaming venues for an indefinite period of time. *See infra* App. A, *Over Your Limit* 1 (obtained in person from Caesar's Windsor Responsible Gaming Information Centre on Aug. 23, 2008) (hereinafter List, or Release, as the context dictates).

Many of the references cited in this work will relate to the Province of Ontario because an earlier article (and report) on the issue of problem gambling[3] dealt specifically with the liability of Ontario's gaming venues to problem gamblers.[4] However, many of the basic principles of tort law and contract law raised within this article are applicable to the Commonwealth and the United States. The issues in tort are analyzed through the traditional elements of the action – duty of care, standard of care, proximity, and recognizable loss. We also offer a critique of Justice Macdonald's unfortunate *obiter* comments in *Treyes v. Ontario Lottery & Gaming Corporation*.[5] Issues in contract will also be examined. The issues in contract (namely, consideration and mental capacity) arise from self-identified problem gamblers who have signed a contractual undertaking to be excluded from casinos.

II. Problem Gambling vs. Pathological Gambling

All forms of writing – articles, reports, and even legal judgments – are written with some measure of equivocation. The difference between "problem gambling" and "pathological gambling" is one such equivocation that is rarely addressed in legal literature.

According to the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR"), published by the American Psychiatric Association, "[p]athological gambling (PG) is characterized by persistent and progressive gambling behavior despite negative consequences and/or the desire to quit . . . ."[6] Pathological gambling is considered to be an impulse control disorder, as defined in the DSM-IV-TR, where the gambler seeks a small, short-term gain at the expense of a large, long-term loss.[7] Impulse control disorders are considered to be part of the obsessive-compulsive disorder spectrum[8] and not an addiction or addictive disorder *per se*.[9]

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[3] William V. Sasso & Jasminka Kalajdzic, *Do Ontario and Its Gaming Venues Owe a Duty of Care to Problem Gamblers?*, 10 Gaming L. Rev. 552 (2006); *see also* Andrew Chung, *Casinos Not Taking Chances in Court; Provincial Agency Settling Cases Brought by Problem Gamblers to Avoid Setting Precedents*, Toronto Star, Aug. 5, 2007, at A01, *available at* www.thestar.com/printArticle/243348 (last visited Mar. 27, 2010) ("[T]he OLG [Ontario Lottery and Gaming Corporation] would likely be found liable to a person who signed a self-exclusion contract and was permitted to re-enter [a gaming venue] and play anyway.") (internal quotations omitted)).

[4] *But see* Emir A. C. Mohammed, *The Problem with Problem Gaming: A Response to Sasso and Kalajdzic, in Defense of the Gaming Industry*, 12 Gaming L. Rev. 340 (2008) (critiquing Sasso & Kalajdzic's article and the report it was based on); Jamie Cameron, *Problem Gamblers and the Duty of Care: A Response to Sasso and Kalajdzic*, 11 Gaming L. Rev. 554 (2007) (examining the soundness of the claim that the province and its gaming revenues can be held responsible for gambling losses).

[5] Treyes v. Ontario Lottery & Gaming Corp., [2007] 49 C.P.C. (6th) 400 (Can.).

[6] David Crockford et al., *Prevalence of Problem and Pathological Gambling in Parkinson's Disease,* 24 J. Gambling Study 411, 412 (2008).

[7] American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 671-74 (4th ed. text rev. 2000).

[8] *Id.* at 663 ("Pathological Gambling" is classified as a type of "Impulse-control disorders not elsewhere classified").

[9] *See, e.g.*, Nancy M. Petry, *Should the Scope of Addictive Behaviors Be Broadened to Include Pathological Gambling?*, 101 Addiction 152 (2006) (Supp. 1) (examining the

Problem gambling, on the other hand, is defined by whether harm is experienced by the gambler or others, rather than by the gambler's behaviour. According to the Canadian Problem Gambling Index ("CPGI")[10] – whose "goal was to develop a new, more meaningful measure of problem gambling for use in general population surveys, one that reflected a more holistic view of gambling, and included more indicators of social context"[11] – problem gambling can be generally identified based on demographic information and the extent of involvement (e.g. types of games, frequency of play, amount spent) in gambling activities.[12] The categories of gamblers identified by these diagnostic groupings are: non-gambling, non-problem gambling, low risk gambling, moderate risk gambling, and problem gambling.[13] The CPGI analysis includes forty-six variables.[14] Problem gambling, at the demographic level, requires a score between eight and twenty-seven on the CPGI and identifies gamblers "who have experienced adverse consequences from their gambling, and may have lost control of their behaviour."[15] For problem gamblers, "involvement in gambling can be at any level, but is likely to be heavy."[16] This demographic group is more likely to experience cognitive distortion – whereby a negative spin is placed on all thoughts and experiences, often leading to depression.[17]

Based on the CPGI, the Problem Gambling Severity Index ("PGSI") was developed as a diagnostic tool for use by health care professionals.[18] The PGSI features nine questions, each with a weighting of zero to three points.[19] A score of zero indicates non-problem gambling; a score of one or two indicates a low level of problems with few or no identified negative consequences; a score of three to seven indicates a moderate level of problems leading to some negative consequences; and a score of eight or more indicates problem gambling with negative consequences and a possible loss of control.[20] Indeed, a score of eight or more might indicate pathological gambling, but not necessarily. In sum, all pathological gambling is a form of problem gambling, but not *vice versa*.

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advantages and disadvantages of expanding addictive disorders to include pathological gambling).

[10] Jackie Ferris & Harold Wynne, Canadian Centre of Substance Abuse, *The Canadian Problem Gambling Index: Final Report* (2001) [hereinafter *CPGI Final Report*].

[11] *Id.* at *6.

[12] *Id.*

[13] *Id.* at *2.

[14] *Id.* at *18.

[15] *Id.* at *30.

[16] *Id.*

[17] *See generally* AARON T. BECK, COGNITIVE THERAPY AND THE EMOTIONAL DISORDERS (1975).

[18] Katherine Marshall & Harold Wynne, *Fighting the Odds*, PERSPECTIVES ON LABOUR & INCOME, 5-13 (Dec. 2003), *available at* http://www.statcan.gc.ca/studies-etudes/75-001/archive/2003/5018524-eng.pdf.

[19] Problem Gambling Severity Index, Problem Gaming Project, The Centre for Addiction and Mental Health, *available at* http://www.problemgambling.ca/EN/Documents/ProblemGamblingSeverityIndex.pdf.

[20] *Id.*

III. The Liability in Tort to Problem Gamblers

In assessing whether casinos are liable to problem gamblers in tort law, courts traditionally apply the law of negligence. However, the law of negligence serves to create legal disincentives to risk-creating behaviour.[21] Ascribing a duty of care to a legally blameless party, like a casino, simply because it is economically, socially, or politically convenient to do so, would work against the very principles that the law of negligence is based upon.

Actions in negligence must satisfy the usual elements.[22] First, the claimant must have suffered a loss, injury, or damage that is legally recognizable.[23] Second, the defendant's conduct must be negligent and in breach of the standard of care set out by the law.[24] Third, the court must find a legally recognized duty owed by the defendant to the claimant to avoid the damage suffered.[25] Fourth, the damage suffered by the complainant must be caused by the negligent conduct of the defendant.[26] Last, the damage must be caused, in fact and in law, by the defendant's actions or omissions.[27]

For problem gamblers to ground a cause of action in negligence against casinos (a novel action in itself), a court must be satisfied that:

1. the loss suffered by the gamblers is a legally recognizable loss;
2. the casino owed a duty of care to the problem gamblers;
3. a reasonable standard of care has been breached by the casino;
4. the casino caused the loss suffered by the pathological gamblers; and

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[21] Hanke v. Resurfice Corp., [2007] 1 S.C.R. 333, 2007 SCC 7, para. 6 (Can.).

[22] *See generally* Hill v. Hamilton-Wentworth Reg'l Police Servs. Bd., [2007] 3 S.C.R. 129 (Can.) (analyzing the tort of negligent investigation, including the duty of care, standard of care, loss or damage, and causal connection); Childs v. Desormeaux, [2006] 1 S.C.R. 643 (Can.) (analyzing the duty of care, including foreseeability and failure to act); Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, para 44 (Can.) ("In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care, (ii) that the defendant breached that duty of care, and (iii) that damages resulted from that breach."); Edwards v. Law Soc'y of Upper Canada, [2001] 3 S.C.R. 562 (Can.) (considering whether a duty of care will be recognized in a particular case and whether under the circumstances, reasonably foreseeable harm and proximity can be found to establish a prima facie duty of care).

[23] *Hill*, [2007] 3 S.C.R. 129 at para. 90 ("To establish a cause of action in negligence, the plaintiff must show that he or she suffered compensable damage. Not all damage will justify recovery in negligence.").

[24] Cooper v. Hobart, [2001] 3 S.C.R. 537 (Can.) (discussing whether a statutory regulator owes a private law duty of care to members of the investing public for negligence in failing to properly oversee the conduct of a mortgage broker licensed by the regulator).

[25] Fullowka v. Pinkerton's of Canada Ltd., [2010] 2010 SCC 5 (Can.) (on the duty of care of the Government and private security company to temporary workers during a strike).

[26] *Hanke*, [2007] 1 S.C.R. 333 at para. 21 ("First, the basic test for determining causation remains the 'but for' test. This applies to multi-cause injuries. The plaintiff bears the burden of showing that 'but for' the negligent act or omission of each defendant, the injury would not have occurred. Having done this, contributory negligence may be apportioned, as permitted by statute.").

[27] Mustapha v. Culligan of Can. Ltd., [2008] 2 S.C.R. 114, para. 12, 2008 SCC 27 (Can.) ("The remoteness inquiry asks whether 'the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable' . . . . [T]he principle has been that 'it is the foresight of the reasonable man which alone can determine responsibility' . . . .").

5. the casino was the sufficiently proximate cause of the loss suffered by the problem gamblers.

A. A Legally Recognizable Loss?

Losses in tort law stem from the truism that "the essential purpose of tort law . . . is to restore the plaintiff to the position he or she would have enjoyed but for the negligence of the defendant."[28] The plaintiff, however, must not be placed in a position better than his or her original one. It is the difference between the "original position" and the "injured position" that is identified as the plaintiff's loss. Thus, the underlying "condition" of problem gamblers (or even the pathological gambler) must *not have occurred before* they began gambling at the casino in question because the "harm" for problem and pathological gamblers is the underlying condition itself and not the pure economic loss.[29] The underlying condition must be *caused* by the defendant's alleged negligence.[30]

In the case of problem, or even pathological gamblers, the economic loss must be causally connected to the underlying condition, and that "condition" must be caused by the gambling facility. The financial loss of problem gamblers is characterized as a "pure economic loss" (i.e. a loss suffered by an individual that is not accompanied by a physical injury or property damage).[31] Purely economic losses are usually not recoverable under the common law due to problems with compensating an indeterminate number of defendants, for an indeterminate amount of time. However, the Supreme Court of Canada, in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, recognized five different categories of negligence claims for which a duty of care has been found with respect to purely 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; and

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[28] Athey v. Leonati, [1996] 3 S.C.R. 458, para 20. (Can.).

[29] Brooks v. Canadian Pac. Ry., [2007] 283 D.L.R. (4th) 540 (Can.). *Brooks* sets out many of the rationales clearly:

> The law has always treated negligently inflicted pure economic loss differently from consequential economic loss.
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> . . . .
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> . . . The loss of the use and enjoyment of one's property is economic loss . . . . [T]he plaintiffs' claim as pled in this regard is clearly a claim for pure economic loss and not consequential economic loss.
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> . . . .
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> The common law has been reluctant to find a duty of care to avoid causing foreseeable pure economic loss for policy reasons. By definition, such losses are not the direct result of the defendants' actions.

Id. at paras. 61-62, 83.

[30] *See* discussion *infra* Parts III.C and III.D (discussing causation and proximity).

[31] *See* Canadian Nat'l Ry. Co. v. Norsk Pac. S.S. Co., [1992] 1 S.C.R. 1021 (Can.). *See also* Robert G. Belliveau & Kevin Gibson, *Dangerous Defects and Claims for Pure Economic Loss*, Apr. 14, 2009, *available at* http://mcinnescooper.com/index.cfm?cm=News&ce=details&primaryKey=27349 (last visited Mar. 30, 2010) (offering a comprehensive discussion of the English and Canadian authorities in this area).

5. Relational Economic Loss.[32]

In that case, Justice McLachlin (as she was then), adopted an approach for determining whether recovery for purely economic losses in novel actions should be permitted by the courts, asking:

1. Is there a duty relationship sufficient to support recovery?; and
2. Is the extension desirable from a practical point of view, i.e., does it serve useful purposes or, on the other hand, open the floodgates to unlimited liability?[33]

Even if a problem gambler's purely economic losses could fit under one of the five categories in *Canadian National Railway*, it would not satisfy Justice McLachlan's elements since it would not cure or prevent the underlying "condition" of problem gambling (or pathological gambling, for that matter). It would also "mark a radical extension of the neighbor principle, with significant consequences for theories of responsibility . . . ."[34] This type of extension would create a duty to an indeterminate group of individuals and create an unlimited liability for casinos to all *possible* problem gamblers. Such an extension would defeat the cardinal purpose of finding a duty of care, which is "to take all due care and to carry safely as far as *reasonable* care and forethought can attain that end."[35]

In their article, "*Do Ontario and its Gaming Venues Owe a Duty of Care to Problem Gamblers?*,"[36] authors Sasso and Kalajdzic attempt to draw an analogy between the liability of commercial hosts to intoxicated patrons[37] and the liability of casinos to their patrons, specifically, problem gamblers. In her comprehensive response to this analogy, Professor Jamie Cameron concludes that "gaming venues do not have the same capacity to identify problem gamblers as bar hosts do to assess whether a patron is intoxicated. . . . [A]ny analogy between intoxicated patrons and problem gamblers is flawed, and unhelpful as a result."[38]

Where a prima facie duty of care cannot be established by analogy to an already decided case,[39] it must be established using the approach initially set out by the English House of Lords in *Anns v. Merton London Borough Council*[40] (the "*Anns* test") – and adopted by the Supreme Court of Canada in *Cooper v. Hobart*.[41] Professor Cameron applies the *Anns* test to Sasso and

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[32] *Canadian Nat'l Ry. Co.*, [1992] 1 S.C.R. 1021 at para 160.
[33] *Id.* at para. 31 (citing *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (Can.)).
[34] Cameron, *supra* note 4, at 555.
[35] Kauffman v. Toronto Transit Comm'n, [1960] S.C.R. 251, 255 (Can.) (emphasis added).
[36] Sasso & Kalajdzic, *supra* note 3.
[37] *See* Jordan House Ltd. v. Menow, [1974] S.C.R. 239, 248-49 (Can.).
[38] Cameron, *supra* note 4, at 559.
[39] Mustapha v. Culligan of Can. Ltd., [2008] 2 S.C.R. 114, para. 5, 2008 SCC 27 (Can.) ("In many cases, the relationship between the plaintiff and the defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis. As stated by A. M. Linden and B. Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the *Anns* formula . . . .") (citation omitted)).
[40] Anns v. Merton London Borough Council, [1978] A.C. 728, 751-52 (H.L.).
[41] Cooper v. Hobart, [2001] 3 S.C.R. 537, para. 30, 2001 SCC 79 (Can.). The court remarked:

Kalajdzic's claim that problem gamblers are owed a duty of care by gaming facilities.[42] Cameron explains that "any prima facie duty of care that could be established would likely be negated for policy reasons" and that "there is no precedent for a claim that seeks recovery for the economic losses incurred by problem gamblers."[43] Cameron concludes that there is no reasonable proximity between the gambler and the gaming facility in order to create a duty of care: "the gaming industry is not capable of assessing a person's urge to gamble, evaluating the connection between the speed and size of bets and the existence of a problem, or drawing a line between reckless behavior and problem gambling."[44]

B. What is the Standard of Care?

Sasso and Kalajdzic suggest that gaming facilities have the ability to monitor their patrons for "problem" behaviour.[45] However, monitoring casino patrons for all possible signs of problem gambling "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."[46] The serious privacy implications of this have been subject to scrutiny in earlier works.[47]

This may deal with the concern of policing problem gamblers (writ large), but self-identified problem gamblers present their own difficulties. These gamblers have signed a self-exclusion agreement with the casino whereby the casino undertakes to exclude them on future visits. Indeed, if the duty of care is understood as being to one's neighbour (i.e. persons so closely affected by the acts or omissions that we ought to reasonably have had them in contemplation when so acting or failing to act),[48] then the Release and List[49] comes closer to bringing the problem gambler into the definition of neighbour.[50]

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

Id. (emphasis in original).

[42] *Id.*

[43] *Id.* at 561.

[44] *Id.* at 564. Indeed, the remaining sections on the tortious liability of casinos to problem gamblers presumes that we can overcome all of the objections raised by Professor Cameron about extending a duty of care in the first place. *See generally id.* at 560-71 (describing why it would be unsound to impose a duty of care on casinos to problem gamblers).

[45] *See* Sasso & Kalajdzic, *supra* note 3, at 556-57.

[46] Mohammed, *supra* note 4, at 342 (emphasis in original).

[47] *See, e.g.*, Mohammed, *supra* note 4.

[48] Donoghue v. Stevenson, [1932] A.C. 562, 580 (H.L.) (referencing Lord Atkin's famous formulation of the neighbour principle).

[49] *See supra* note 2 and accompanying text.

[50] Mohammed, *supra* note 4.

However, the standard of care for that alleged duty is one of reasonable surveillance.[51] The standard recognizes that humans are imperfect.[52] No surveillance system can completely exclude unwanted guests or trespassers, otherwise, we would not be having this debate. So, even if casinos owe a duty of care to self-identified problem gamblers, the standard of that duty is still that of "reasonable surveillance." There is still no liability in tort if the casino did all that it could reasonably do (given human frailty and imperfection) to prevent problem gamblers from their own actions. As airport and national security have demonstrated time and time again, even the most rigorous forms of surveillance are prone to human error, oversight, deception, cunning, and imperfection.

Even if casinos' security personnel were held to be professionals at surveillance, perhaps akin to airport surveillance, it still does not necessarily make them liable. This is especially true if it can be demonstrated that self-identified problem gamblers as a "class," or a particular problem gambler, have been removed from the gaming venue on several occasions. This would demonstrate that gaming venues are exercising their alleged duty of care in a reasonable and diligent manner, albeit imperfectly.

C. But Who Caused the Loss?

Assume for the moment that problem gamblers can establish a duty of care either as an un-indentified class or as self-identified problem gamblers. Also assume that the casinos have no defences available to them and such gamblers can recover purely economic losses. There must still be a linkage between the casino's actions (or omissions) and the harm/loss suffered by problems gamblers.

To establish causation, the "but for" test, as stated in *Hanke v. Resurfice Corp.*, must be applied.[53] This test "ensures that a defendant will not be held

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[51] The "man on the Clapham omnibus" standard is said to apply to situations involving ordinary people. Where someone holds themselves out to hold a special skill, then the standard is that of a reasonable person in that profession or calling (even a chimney-sweep is considered a "calling," so we have no doubt that casino surveillance is a profession as well). In *Canada v. Blue Peter Steamships Co.*, [1974] F.C.J. No. 314 (Nfld. F.C.T.D.) (QL), the court adopted Professor Winfield's formulation of the reasonable person as set forth in WINFIELD ON TORTS, (8th ed. 1967) (emphasis added):

> Lord Bowen visualised the reasonable man as "the man on the Clapham omnibus": an American writer as "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules, nor has he "the prophetic vision of a clairvoyant". He will not anticipate folly in all its forms, but he never puts out of consideration the teachings of experience and so will guard against the negligence of others when experience shows such negligence to be common. *He is a reasonable man but he is not a perfect citizen*. This is good so far as it goes, but it must be added that where a person exercises any calling, the law requires him, in dealing with other people in the course of that calling, to exhibit the degree of skill or competence which is usually associated with its efficient discharge. *Nobody expects the man on the Clapham omnibus to have any skill as a surgeon, a lawyer, a docker, or a chimney-sweep unless he is one; but if he professes to be one, then the law requires him to show such skill as any ordinary member of the profession or calling to which he belongs, or claims to belong, would display*.

[52] *Id.*

[53] Hanke v. Resurfice Corp., [2007] 1 S.C.R. 333, 2007 SCC 7, para. 21 (Can.).

liable for the plaintiff's injuries where they 'may very well be due to factors unconnected to the defendant . . . .'"[54] The court must conclude that the loss would not have occurred "but for" the conduct of the defendant.[55] If the court determines this in the affirmative, then the defendant's actions or omissions can be said to be the cause of the plaintiff's loss.[56] If the damage would have occurred in any event, with or without the act of the defendant, then the conduct is not the cause of the damage.[57] *The defendant's act must make a difference*; if it had nothing to do with the loss, then no liability can be imposed.[58]

A recent study conducted at the Norwegian University of Science and Technology sought to identify the probable risk factors that lead to the development and maintenance of pathological gambling.[59] The study identified, reviewed, and integrated seven studies in its analysis of pathological gambling risk factors.[60] The study concluded that the *well established risk factors* for the development and maintenance of pathological gambling were: age, gender, the illusion of control, availability of plays, sensory characteristics, schedules of reinforcement, obsessive compulsive disorder (OCD), alcoholism, and other drug abuse.[61] The study listed the *probable risk* factors for the development[62] (and maintenance) of pathological gambling as: employment status, social welfare status, urban residence, low academic achievement, immigrants, heart rate arousal, transmitter activity, genetic studies, erroneous perceptions, age of onset, rapid onset, depression, anxiety, personality disorders, coping styles, impulsivity, and sensation seeking.[63]

Reviewing the factors outlined in the study, it cannot be said that a casino's failure to monitor patrons for signs of pathological gambling[64] or its failure to expel self-identified problem gamblers[65] (on a balance of probabilities) *causes* problem gambling. Indeed, even if casinos were to monitor patrons using clinical psychiatrists and psychologists and/or exclude problem gamblers using the *utmost standard* of surveillance, gamblers would still develop problem gambling behaviours (or "risks"). Indeed, to establish causation, the court must find *probable* cause, not just a possible cause.[66] It would therefore be impossible to find that the acts or omissions of gaming facilities are the probable cause of a serious impulse control disorder that has *many* known causes and risk factors. Professor Cameron identifies that "problem

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[54] *Id.* at para. 23 (quoting Justice Sopinka in Snell v. Farrell, [1990] 2 S.C.R. 311 (Can.)).
[55] *Id.* at para. 21.
[56] *Id.* at para. 23.
[57] Horsley v. MacLaren, [1972] S.C.R. 441, 444-45 (Can.); *see generally* Athey v. Leonati, [1996] 3 S.C.R. 458 (Can.) (discussing the "but for" and "material contribution" tests).
[58] *Horsley*, [1972] S.C.R. 441, at 444-45; *Snell v. Farrell*, [1990] 2 S.C.R. 311, 326-7.
[59] *See* Agneta Johansson et al., *Risk Factors for Problematic Gambling: A Critical Literature Review*, 25 J. GAMBLING STUDY 67 (2009).
[60] *Id.* at 68-69.
[61] *Id.* at 78.
[62] We should note that pathological gambling is the "high water" mark for problem gambling. Therefore, this study is also useful in distilling many of the general components of problem gambling as well.
[63] Johansson et al., *supra* note 59, at 78.
[64] Sasso & Kalajdzic, *supra* note 3, at 563.
[65] *Id.* at 564.
[66] Mustapha v. Culligan of Can. Ltd., [2008] 2 S.C.R. 114, para. 13, 2008 SCC 27 (Can.).

gamblers can gain access to a variety of gaming opportunities that are not managed by the OLGC [the Ontario Lottery and Gaming Corporation[67]], such as casinos in Quebec or the state of New York, and on the Internet."[68]

The foregoing analysis presumes that the courts follow the traditional "but for" approach to causation. In exceptional situations, courts will deviate from this approach where the defendant "materially contributed" to the plaintiff's loss or injury. This "material contribution" test, as discussed in *Resurfice*, only applies if two requirements are met.[69] First, it must be impossible, due to factors outside of the plaintiff's control, for the plaintiff to prove that the defendant's negligent action caused the plaintiff's loss by using the "but for" test.[70] Second, "it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of [loss], and the plaintiff must have suffered that form of [loss]."[71] The plaintiff's loss must "fall within the ambit of the risk created by the defendant's breach."[72]

The material contribution test fails to prove causation of problem gambling by way of acts or omissions by gaming facilities because, as we (and Professor Cameron) have already explained, there is no duty of care between problem gamblers and gaming facilities. In sum, casinos do not cause problem gambling.

D. Proximity

Even if problem gamblers could establish that gaming facilities owe them a duty of care for harm caused by the casino resulting in a recognizable loss, it is unlikely that problem gamblers could establish sufficient proximity to ground their claims in negligence.

Proximity, or the neighbour principle, was famously set out by Lord Atkin in *Donoghue v. Stevenson*.[73] It is recognition of the need to protect: "persons who are so closely and directly affected by [our] act[s] that [we] ought reasonably to have them in contemplation as being so affected when [we are] directing [our] mind[s] to the acts or omissions which are called in question."[74]

In this case, there is simply no proximity between problem gamblers (writ large) and casinos, since the casinos "have no direct knowledge of those who choose not to self-exclude, are not capable of diagnosing problem gambling, and are not in a relationship of sufficient proximity to unidentified problem gamblers to establish a prima facie duty of care."[75]

Although not strictly an element of proximity, it is also relevant to consider the remoteness of the damage because it could be argued that problem

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[67] The OLGC is the provincial agency created by the *Ontario Lottery and Gaming Corporation Act, 1999*, and charged with operating and managing lotteries, casinos, and racetrack slot facilities throughout Ontario. Ontario Lottery & Gaming Corp. Act, 1999 S.O., ch. 12, § 3 (Can.).

[68] Cameron, *supra* note 4, at 563.

[69] Hanke v. Resurfice Corp., [2007] 1 S.C.R. 333, para. 24, 2007 SCC 7 (Can.).

[70] *Id.* at para. 25.

[71] *Id.*

[72] *Id.*

[73] Donoghue v. Stevenson, [1932] A.C. 562 (H.L.).

[74] *Id.* at 580.

[75] Cameron, *supra* note 4, at 565.

gambling (especially pathological gambling) is an unreasonable psychological harm, and therefore not reasonably foreseeable by casinos. The forseeability of these types of harms was recently explained by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.* as a "loss suffered by the plaintiff . . . [that] was too remote to be reasonably foreseen and that consequently, [the plaintiff could not] recover damages from the defendant."[76] As Nicole Mangan explained, "[t]he [*Culligan*] decision carefully assessed the meaning of personal injury and whether the psychological conditions claimed qualified as injuries. The principles are appropriate for all unexpected personal injuries."[77]

The limits of recovery for such remote psychological damages were also stated in the English case of *White v. Chief Constable of South Yorkshire Police*, where the court reasoned that "[t]he law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals."[78] The Supreme Court of Canada further elaborated on these limits in *Mustapha*, stating that "unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable. . . . [T]he law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance."[79]

Indeed, there are many patrons who frequent casinos often (the authors included), who do not become problem gamblers (or pathological gamblers). It is clear that these disorders can be classified as unusual and extreme "reactions," and therefore, do not fall within the gambit of reasonably foreseeable harms relating to gaming. They are precisely the types of psychological disorders that would fall within the limitation described by the Supreme Court of Canada in *Culligan*.

But what about self-excluded problem gamblers?[80] Would their self-exclusion make their losses more foreseeable with respect to proximate cause and remoteness? As Sasso and Kalajdzic explain, "there will be problem gam-

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[76] Mustapha v. Culligan of Can. Ltd., [2008] 2 S.C.R. 114, para. 20, 2008 SCC 27 (Can.).

[77] Nicole Mangan, *The Fly in the Water Bottle: How Mustapha Modifies the 'Thin Skull' Rule*, THE LAW. WKLY., Sept. 5, 2008, at 10, 11.

[78] White v. Chief Constable of S. Yorkshire Police, (1998) 2 A.C. 455.

[79] *Mustapha*, [2008] 2 S.C.R. 114 at para. 16. Although, the Supreme Court did note that where the "defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant." *Id.* at para. 17. This may suggest an avenue of recovery for self-identified problem gamblers who can demonstrate some form of psychological injury that rises *above* "mere" high frequency gambling:

> [A] plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort. . . . This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness . . . . The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept.

Id. at paras. 8, 9.

[80] Note here we are specifically talking about self-identified *pathological* gamblers.

blers who have identified themselves as such to the casino management and/or employees and have either sought their assistance through the execution of the Self-Exclusion Form or in some other manner."[81] However, persons can voluntarily self-exclude themselves from casinos without necessarily being problem gamblers (or even pathological gamblers) in the clinical sense. Further, these self-identified problem gamblers may not necessarily meet the clinical criteria set out in DSM-IV-TR or the PGSI for problem gamblers and pathological gamblers. Therefore, if clinically diagnosed pathological gamblers are not owed a duty of care by gaming facilities, then, *prima facie*, self-identified problem gamblers should not be owed a duty of care by the gaming facilities. For these (non-pathological) problem gamblers, Professor Cameron explains that:

> Those who self-identify and sign the form choose whether to respect the ban or to violate it by seeking access to gaming facilities. The gambler has accepted responsibility for his or her own behavior and is made aware, by the process and the terms of the form, that he or she cannot rely on the facility for protection from problem gambling. In those circumstances, there can be no proximity under *Anns*, and no prima facie duty of care, for problem gamblers who have self-excluded.[82]

"True" pathological gamblers who self-exclude, however, do not have the ability to control their impulses.[83] Unless pathological gamblers expressly identify themselves as such at the time of self-exclusion, the extreme reaction to gaming facilities that they experience is not the type of foreseeable harm that is proximately caused by the actions or omissions of gaming facilities. If at the time of self-exclusion, pathological gamblers do indeed identify themselves as suffering from a clinical inability to control their gambling impulses, then the foreseeability of the harm may be satisfied from a tort perspective; but this is where the contract issues become especially important.[84]

Nonetheless, despite the slight caveat outlined above, all of the elements of the tort of negligence do not appear available to problem gamblers. Permitting a claim of this sort is not only novel, but would be bewildering to tort law principles.

E. The Defences in Tort

Even if all of the elements of the tort of negligence are satisfied, all of main defences to a claim in negligence appear applicable.

Because self-identified problem gamblers are implicitly consenting to the risks involved in their gambling, it would seem that the casino could avail itself of the defence of *volenti non fit injuria*, or the voluntary assumption of risk. Having been placed on the List, self-identified problem gamblers have understood and implicitly consented to any risk of injury. One could argue that self-identified pathological gamblers can never truly consent to the risks of their gambling because of the nature of their mental illness. However, the criminal jurisprudence on pathological gamblers is frank in this regard. In *R. v. Reshke*, Justice Moreau commented that he was:

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[81] Sasso & Kalajdzic, *supra* note 3, at 562-63.
[82] Cameron, *supra* note 4, at 565.
[83] *See supra* Part II (discussing the distinction between problem gambling and pathological gambling).
[84] *See infra* Part V.

> satisfied that Mr. Reshke's [pathological] gambling addiction 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 persons he gambled with] *was deliberate, well-planned and repeated*.[85]

Even though this case was within the context of a criminal fraud proceeding, the same level of self-accountability can be said to extend to pathological gamblers who systematically seek out and obtain new lines of credit, evade security, and continue their gambling (thereby trespassing – criminally and civilly – on casino property).[86]

Returning to the defences available to the casino, self-identified problem gamblers 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, in a perverse way, would only be negligent for failing to detect, or enforce, the trespass of the problem gambler onto its premises. Any losses that self-identified problem gamblers incur would be a result of their actions. On some level, there ought to be *some* measure of responsibility on the part of self-

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[85] R. v. Reshke, [2004] 358 A.R. 63, para. 53 (Can.) (emphasis added).

[86] *See also* R. v. Oates, [2008] 318 Sask. R. 129, paras. 53-54 (Can.) ("[T]he casino records reflect a serious problem gambler and possibly an addiction. I am, for the purposes of sentencing, prepared to accept that Ms. Oates did have a gambling addiction. *This addiction will diminish her responsibility somewhat in my decision on an appropriate sentence - but it cannot unduly limit her personal responsibility for her actions*.") (emphasis added)). This can be contrasted with Justice Belanger's *dicta* in *R. v. Dulmage*, [2003] O.J. No. 3834 (J. Ct.) (Can.) (concerning a member of the Armed Forces who stole from his employer to support his gambling addition) where he writes that:

> It seems to me that we must keep that perspective in mind, that the Federal, Provincial and indeed Municipal authorities bear some collective responsibility for the creation of (and I use this word guardedly) "The Monster"; you know, the gambling addict, the gambling personality.
>
> Therefore when a person like you has fallen prey to a government sponsored enterprise, the government ought to bear its share of responsibility, and ought perhaps to be . . . less strident in its insistence, that people who fall prey to this addiction be jailed because they have resorted to illegal means to obtain funds.
>
> The same might be said, for example, if the government were to sponsor the sale of cocaine, albeit it is certainly an addiction on a different scale.

Id. at paras. 7-9.

> It is clear that Justice Belanger is speaking in the context of the Crown asking for a protracted incarceration of an individual based on the frauds he committed in support of his addiction. With respect, Justice Belanger's emotive reference to cocaine is perhaps an empty analogy. A more suitable analogy would be the Government's restriction and licensing of the sale of alcohol. Would Justice Belanger advocate that the Government share in the blameworthiness of alcoholics who kill or seriously injure another in support of their addiction? Or while driving? The authors seriously doubt it.

identified problem gamblers.[87] After all, problem gamblers do not become mindless automatons due to their illness.[88]

Even if the problem gambler cannot be seen to be contributorily negligent, gaming facilities could also raise the doctrine of *ex turpi causa non oritur actio*, a doctrine that prevents recovery when claimants themselves were involved in a wrongful act. Since self-identified problem gamblers have committed a trespass, the law should not aid them in recovering their losses since it would be unjustly enriching problem gamblers for their trespass. Although the Supreme Court of Canada curtailed the use of this doctrine for actions in negligence,[89] in *Hall v. Hebert*, Justice McLachlin, (as she was then) writing for the majority, specifically noted that:

> [o]ne situation in which there seems to be a clear role for the doctrine is the case where to allow the plaintiff's tort claim would be to permit the plaintiff to profit from his or her wrong.
>
> . . . .

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[87] The earlier criminal jurisprudence appears to support this contention. A particularly insightful account of this view is offered by the late, and venerable, Shannon Bybee in *Problem Gambling: One View from the Gaming Industry Side*, 4 J. GAMBLING BEHAV. 301 (1988). The abstract alone is quite telling:

> An experienced lawyer for the gaming industry argues that the very appellation of "compulsive gambling" is misleading. Advocates of the medical model of compulsive gambling have created a strange new disease, where individuals are viewed as not responsible for their misdeeds but as solely responsible for their own cure. The fact that some individuals have problems because of gambling does not lead to the conclusion that casinos bear the ultimate legal or moral responsibility. More research and dialogue is needed; but so is the acceptance by problem gamblers and those who study and treat them that individuals have to take responsibility for their own conduct.

Id. at 301.

[88] We appreciate that in some rare cases, as in *R. v. Horvath*, the pathological gambler may indeed come close to automatism. R. v. Horvath, [1997] 152 Sask. R. 277 (Can.). In Horvath, the judge described the pathological gambler as:

> [O]ne of the worst cases of a pathological gambler he had ever seen. When asked where he [the psychiatric nurse who diagnosed the defendant] would put the respondent on a scale of one to ten, he replied:
>
> > Oh, I'd put her about nine point five. I don't like putting anybody at ten. Probably the closest thing to ten. She has a – she has a severe gambling problem.
>
> He was of the view that she would have no difficulty losing $400.00 an hour.

Id. at para. 8.

However, such a case may be contrasted with the case in *R. v. Oates*, [2008] 318 Sask. R. 129 (Can.):

> Here, as in *Horvath*, *supra*, the accused has been diagnosed with having a pathological gambling problem. However, unlike *Horvath*, Ms. Oates [the defendant pathological gambler] was not experiencing extensive indebtedness from gambling. It did not appear that she diminished her personal resources to any significant extent to gamble, relying rather on the government's money which she obtained unlawfully. Having said that, [the defendant pathological gambler] asserts that she did refinance her home and take out a line of credit, the proceeds of which were used primarily for gambling. Her family relationships were not disrupted. She experiences a strong and supportive family, who apparently knew nothing of her gambling problems or her crime. She also apparently has many friends who did not know anything about her addiction or her criminal activity. She did not neglect her work and she was held in high esteem by other members of the various organizations she supported and worked for.

Id. at para. 52.

[89] PHILIP OSBORNE, THE LAW OF TORTS 112 (3d ed. 2007).

> Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to *profit from an illegal or wrongful act*, or to *evade a penalty prescribed by criminal law. Its use is not justified* where the plaintiff's claim is merely for compensation for *personal injuries sustained* as a consequence of the negligence of the defendant.[90]

Hall is therefore a restriction on the use of the doctrine where personal injuries are sustained. However, the doctrine is still applicable to the situation where the problem gambler has committed a civil and criminal wrong by trespassing and entering the gaming venue, loses money, and then seeks to recover purely economic losses from that illegal trespass.[91]

IV. THE DECISION IN *TREYES V. OLGC*

In *Treyes v. Ontario Lottery and Gaming Corp.* ("OLGC"), Justice Macdonald remarked, albeit in *obiter*, that Sasso and Kalajdzic's article "address[ed] many, if not all, of the issues that arise" in this area.[92] With respect, we have demonstrated that this is a complex (and novel) area of tort liability. Sasso and Kalajdzic may have sown the seeds, but the fertile dialogue has only now begun.

Another interesting aspect of *Treyes* is the claimant himself. He suffered from Parkinson's disease for many years, and "[a]s a result of the medications prescribed to treat the symptoms of Parkinson's disease, Mr. Treyes became a pathological gambler and was diagnosed as a pathological gambler in 1999."[93] Indeed, a recent study has confirmed a link between Parkinson's disease, its treatment, and problem gambling (including pathological gambling): "[p]athological gambling (PG) has been indentified in patients with Parkinson's disease (PD) treated with dopamine agonists suggesting that dysregulation of brain dopaminergic activity may contribute to the development of gambling

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[90] Hall v. Herbert, [1993] 2 S.C.R. 159, paras. 11, 25 (Can.) (emphasis added).

[91] Sasso & Kalajdzic, *supra* note 3, at 567-68 (acknowledging the inherent difficulties of recovering purely economic losses); Cameron, *supra* note 4, at 570 (Professor Cameron has also drawn attention to this, noting the difficulty of recovering purely economic losses, as well as the overall problem it presents for fashioning a remedy for litigious problem gamblers).

[92] Treyes v. Ontario Lottery and Gaming Corp., [2007] O.J. No. 2772, para. 12 (J. Ct.) (Can.). The full paragraph reads:

> Before I deal with the legal questions posed in this case, I comment on a recent and comprehensive article that the Plaintiffs included as an exhibit on this motion: William V. Sasso and Jasminda Kolajdzic [sic], "Do Ontario and Its Gaming Venues Owe a Duty of Care to Problem Gamblers?" (2006) 10 Gaming L. Rev. at 552. The article addresses many, if not all, of the issues that arise in cases such as this one including the Voluntary Self Exclusion Program undertaken by the OLGC, and the duty of care of gaming venues. The authors conclude at page 570:
>
> > The ramifications of [*Edmonds v. Laplante* (15 March 2005), Toronto 02/CV226280 (Ont. S.C.J.)] remain to be seen. Will other courts, including appellate courts, follow *Edmonds*? What steps could the OLGC take to meet its duty of care? For the time being, at least one question has probably been answered by *Edmonds:* Do Ontario and its gaming venues owe a duty of care to problem gamblers? Under the current state of the law, the answer would appear to be "yes".
>
> *Id.*

[93] *Id.* at para. 3.

problems."[94] This adds another layer of complexity to the causality issue, because according to this study, and by the court's own admission, it was the Parkinson's disease – or at least the underlying neuropathology – that "caused" the pathological gambling.[95] In other words – akin to bars and alcoholism – casinos may not be the cause of pathological gambling, but are merely outlets for its manifestation.

V. The Liability in Contract to Problem Gamblers

Under Ontario's voluntary self-exclusion program, "Request to be Placed on a List of Self-Excluded Persons and Release," it is problem gamblers who self-identify and sign an undertaking that they wish to be excluded from all Ontario gaming venues for an indefinite period of time.[96] This is the offer; the problem gambler is the promisee. The gaming venue – and the OLGC – then undertake to remove the problem gamblers from their mailing lists and deny them the ability to participate in player programs or other promotions.[97] This is the acceptance; the gaming venue is the promisor.

A. Consideration

Thomas v. Thomas represents one of the oldest truisms in contract law on consideration. Justice Patteson famously noted the following:

> [c]onsideration means something which is of some value in the eye of the law, moving from the plaintiff [i.e. the promisee]: it may be some benefit to the plaintiff, or some detriment to the defendant [i.e. the promisor]; *but at all events it must be moving from the plaintiff*.[98]

With respect to the self-exclusion Release, there is no consideration which moves from the problem gambler to the gaming venue (let alone "at all times"). It is the gaming venue which undertakes a gratuitous promise to keep the prob-

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[94] Crockford et al., *supra* note 6, at 411.

[95] Accordingly, the OLGC was not the cause of Mr. Treyes' pathological gamblng. Section 3 of the OLGC Act provides that:

> The following are the objects of the [Ontario Lottery and Gaming] Corporation:
>
> 1. To develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario.
>
> 2. To provide for the operation of gaming premises.
>
> 3. To ensure that gaming premises are operated and managed in accordance with this Act and the *Gaming Control Act, 1992* and the regulations made under the Acts.
>
> 4. To provide for the operation of any business that the Corporation considers to be reasonably related to operating a gaming premises, including any business that offers goods and services to persons who play games of chance in a gaming premises.
>
> 5. If authorized by the Lieutenant Governor in Council, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of, or in conjunction with, the government of one or more provinces of Canada.
>
> 6. To do such other things as the Lieutenant Governor in Council may by order direct.

Ontario Lottery & Gaming Corp. Act, 1999 S.O., ch. 12, § 3 (Can.).

[96] *Release*, *supra* note 2.

[97] *Id.*; *see also* Cameron, *supra* note 4, at 559 and n.47.

[98] Thomas v. Thomas, (1842) 114 Eng. Rep. 330, 333-34 (Q.B.) (emphasis added).

lem gambler from entering the venue. There is nothing which the problem gambler adds to the bargain.[99]

Even if one could argue that the "right" to enter a gaming venue is the valuable consideration which the problem gambler is surrendering in exchange for exclusion from such gaming venues, such a notional form of consideration lacks sufficiency and certainty. No economic value could reasonably be attached to a notional "right" to enter a gaming venue.[100]

If courts create some type of consideration in this situation, as they tend to do,[101] it must surely be defective or valueless because pathological gambling can never be cured.[102] Even if it can be said that pathological gamblers have given consideration in the form of a denial of their rights, such consideration must fail because pathological gamblers can never "truly" contract out of their right to enter a gaming venue because that is precisely the incurable impulse we are dealing with.

B. Capacity

Another vexing issue surrounding the voluntary self-exclusion program is the very nature of problem gambling itself. If we accept that problem gambling, *especially pathological gambling*, is a real and serious mental illness,[103] then anyone who voluntary self-excludes on their own initiative must necessarily lack the capacity to form a binding agreement. There can never be a true *consensus ad idem* (meeting of the minds).

If pathological gambling deprives individuals of the ability to control their impulses towards gambling, how can a contract which seeks to exclude such people from gambling even be considered enforceable? Pathological gamblers, by definition, lack the capacity to understand how to control their impulses.[104]

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[99] *See* Terrafund Financial Inc. v. 569244 B.C. Ltd., [2000] 20 B.L.R. (3d) 104, para. 25 (B.C.S.C.) (Can.) (noting that "[c]onsideration is simply something of value received by a promisor from a promisee"). Again, the problem gambler provides nothing "of value" to the gaming venue by signing the Release.

[100] White v. Bluett, (1853) 23 L.J. (N.S.) 36.

[101] BRUCE MACDOUGALL, INTRODUCTION TO CONTRACTS 95 (Lexis Nexis Canada 2007). "[C]ourts have been fairly adept at 'finding' consideration, particularly when adequacy is not a concern, it cannot be found where it cannot, from any perspective, be said to have a value [i.e. it is valueless]." *Id.*

[102] GAMBLERS ANONYMOUS, SHARING RECOVERY THROUGH GAMBLERS ANONYMOUS 57 (1st ed. 1984) ("although an individual may control the compulsive gambling disorder, one can never really eliminate the illness from one's psychological make-up"); *see also* Gamblers Anonymous, *Questions & Answers About the Problem of Compulsive Gambling and the G.A. Recovery Program*, http://www.gamblersanonymous.org/qna.html (last visited Mar. 30, 2010) ("compulsive gambling is an illness, progressive in its nature, which can never be cured, but can be arrested"); JACKIE FERRIS, TANIA STIRPE & ANCA IALOMITEANU, GAMBLING IN ONTARIO: A REPORT FROM A GENERAL POPULATION SURVEY ON GAMBLING-RELATED PROBLEMS AND OPINIONS 6 (ARF Research Document Series, No. 137 1996) ("Both the SOGS [South Oaks Gambling Screen] and the DSM-IV criteria assume that gambling is a progressive disorder that can be arrested but never cured, so once someone crosses the 'invisible line' to compulsive or pathological gambling, they are said to have the disease.").

[103] *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 7, at 671-74.

[104] *See* Fowler Estate v. Barnes, [1996] 142 Nfld. & P.E.I.R. 223, paras. 25-26 (Can.).

And if the pathological gambler is not responsible, how does a mere self-exclusion Release suddenly shift responsibility to the gaming venue? Because it is pathological gamblers' very illness that is the cause of the problem, they cannot "contract out" of it.

Pathological gamblers are in no way exercising their free will in "voluntarily" self-identifying and entering into such contracts. One cannot argue that pathological gambling is a real and serious mental illness while affirming in the same breath that such mentally ill persons can voluntary self-exclude through contract. It is an affront to the dignity and severity of the disorder and other impulse control disorders.

Even if one accepts the argument that pathological gamblers are capable of contractually excluding themselves (in law and in fact), the English authorities on mentally incompetent persons suggest that the self-exclusion release is still voidable (and not void *ab initio*) at the behest of the pathological gambler.[105] This view appears to have been accepted by Canadian Courts.[106] This jurisprudential wisdom is hardly fatal. In fact, when such gamblers re-enter the gaming venue they purportedly tried to exclude themselves from, this can reasonably be seen as a rescission of the contract.

VI. Conclusion

There is no liability in tort law, nor the law of contract towards problem gamblers, including pathological gamblers. Any cause of action in this regard would be novel and dangerous, as it would stretch the bounds of basic negligence principles and basic contractual principles to near absurdity.

Indeed, on any legal basis, whether in contract or tort, "policing" problem gamblers is a very complex policy issue that needs Parliament's intervention, wisdom, and full consideration. The spectrum of "problem gambling" from its lowest form ("mere" high frequency gambling) through to its most severe form (pathological gambling) adds many more levels of complexity to the enforceability of the voluntary self-exclusion agreement since there would be varying degrees of "consent" or "capacity" dependent on the problem gambler's particular place in the spectrum. Should the courts intervene in matters of public

> A contract or deed purportedly entered into by a mentally incompetent person is voidable at the option of that person or somebody acting on his or her behalf, if the following conditions can be established:
>
> (1) that at the time of execution, she was mentally incompetent;
>
> (2) by reason of such mental incompetence, she was *not-capable of understanding the terms of the document and of forming a rational judgment of its effect upon her interests*; and
>
> (3) the other party had knowledge, actual or constructive, of such mental incompetence.
>
> It is not mental incapacity in the abstract with renders the contract liable to be set aside. *The mental incapacity that has this effect must be such that it impairs the ability to contract, that is, an ability to understand the nature of the transaction being entered into and its general effect.*

Id. (emphasis added) (internal citations omitted).

[105] Gerald Henry Louis Fridman, The Law of Contract in Canada 158-159 (5th ed. 2006) (citing Imperial Loan Co. v. Stone, [1892] 1 Q.B. 599 (C.A.) and York Glass Co. v. Jubb [1925], 134 L.T. 36 (C.A.)).

[106] *Id.* (citing Fyckes v. Chisholm [1911], 3 O.W.N. 21 (Ont. H.C.); Hardman v. Falk [1955], 3 D.L.R. 129 (B.C.C.A.); Re: Rogers [1963], 42 W.W.R. 200 (B.C.C.A.); and Sawatzky v. Sawatzky [1986], 48 Sask. R. 161 (Sask. Q.B.)).

policy, as they tend to do – whether reluctantly, implicitly, or in the interests of expediency – the territory should be treaded upon very lightly and with full appreciation of all competing considerations. Merely attributing liability, whether in contract or tort, to Ontario gaming venues simply because it is economically, socially, or politically convenient to do so merely strains the relationship between Ontario's gaming venues, regulators, and the "class" of problem gamblers. The goal should be treatment, not litigation, and responsibility, not liability.

OVER YOUR LIMIT

For the majority of people gaming is an enjoyable form of entertainment; unfortunately, for a small number of people, it can become a problem. If you are experiencing difficulties, you should seriously consider taking positive action. There are resources available to individuals who want to – or need to stop gambling. Immediate referral to help is available by calling **The Ontario Problem Gambling Helpline (1-888-230-3505).** Counselling and treatment services are also available in many communities across Ontario. Individuals may also contact self-help groups such as Gamblers Anonymous and Gam-Anon in their communities. Assistance is confidential and services are free of charge. Contacting such community service is as important step in changing your life for the better.

SELF-EXCLUSION

Another step you can take is self-exclusion. It is a self help tool and demonstrates that you acknowledge that you are responsible for your gambling actions and their implications and are taking a positive action to address the problems you may be experiencing with gambling. By signing a Request to be Placed on a List of Self-Excluded Persons and Release (the request), you acknowledge that it is solely your responsibility to ensure that you will not enter an Ontario Lottery and Gaming (OLG) gaming facility and you agree to release OLG and its gaming facilities from any liability should you decide to re-enter an OLG gaming facility and gamble. After signing the Request, OLG gaming facilities will remove you from their mailing lists and deny you the ability to participate in players` programs or receive other promotional benefits. Should you re-enter an OLG gaming facility and are discovered and identified, you will be asked to leave and you may be charged with trespass.

If you decide to self-exclude

If you decide to self-exclude, identify yourself to a member of staff at one of your gaming facilities- or you may call in advance and make an appointment. Self-exclusion must be done in person at any OLG gaming site, including any of the commercial casinos. You can bring a friend or family member with you. Say that you want to self-exclude. You will be asked to read and sign a form, a photograph will be taken and you will be asked to return your players card(s). You will also be given information materials about problem gambling and how you can get more information and help. It is your decision whether to take those next steps.

What happens next?

We will take your name off of mailing lists so that marketing and promotional mailings are no longer sent to you. (Note that a mailing might have already be in process that cannot be stopped, so this might not be effective immediately.)

You will not return to our gaming facilities. If you find this difficult, remember your commitment to yourself and why you made that commitment. And consider contacting the services available to you in your community to help you keep that commitment to yourself.

We do not want you to return if you have taken this step. Please remember, it is solely your responsibility to not return to our gaming facilities after you have self-excluded. We cannot prevent you from returning if you decide to do so. If you do, and are discovered and identified, you will be asked to leave and you may be charged and arrested for trespass without any further warning or notice.

Features

- Self-exclusion applies to all OLG gaming sites including Casino Rama, Casino Niagara, Niagara Fallsview Casino Resort, Casino Windsor, Great Blue Heron Charity Casino and OLG`s charity Casinos and slot facilities at racetracks.

- A person must exclude him or herself; no one can exclude another person (the only exception is under power of attorney).

- The self-exclusion is for an indefinite time period – there is no date of expiry. Reinstatement may be possible after a period of time has elapsed. A request must be submitted in writing to a gaming site. The request will not be considered until six months have passed from the date of self exclusion. The site staff make an appointment for the individual to come to the facility to complete a reinstatement form. The individual must wait an additional 30 days after signing this form at this meeting before returning to a gaming site to play. OLG does not promote reinstatement.

Know your limit, play within it!
Ontario Problem Gambling Helpline 1-888-230-3505