FOOD FOR TORT: GIVING THE CASINO SOME *CONSIDERATION*, A CONTINUED DEFENCE OF THE GAMING INDUSTRY

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Abstract

The author argues against any contractual liability owed to self-identified problem gamblers who may have signed a contractual undertaking to be excluded from casinos, and other gaming venues. Liability in contract is disputed on the grounds that the undertaking lacks consideration, and as such, the problem gambler lacks the requisite level of capacity for a true consensus ad idem. The author also revisits the lingering question of whether a tortious duty is owed to problem gamblers by gaming venues, despite such contractual defects.

A. Introduction

Academia is a strange game. Unlike the private practice of law, defending the 'big guy' is never easy or popular with one's academic peers.[1] This paper continues the author's decidedly 'pro casino' stance, wherein the contractual liability of gaming venues to self-excluded problem gamblers is disputed. It is a continued refutation of the claim that

> a problem gambler **will likely succeed** in establishing that the casino operator, and vicariously the Ontario Government, owes him a duty of care in circumstances where the casino operator

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[1] Emir A. C. Mohammed, "The Problem with Problem Gaming: A Response to Sasso and Kalajdzic, in Defense of the Gaming Industry" (2008) 12 Gaming L. Rev. 340 [*Problem with Problem Gaming*]; Emir A. C. Mohammed, "On The Patentability Of Casino Games In Canada: A Look At Decision In Progressive Games - How Progressive Are We?" *Canadian Gaming Lawyer Magazine*, November 2008; see also Jamie Cameron, "Problem Gamblers and the Duty of Care: A Response to Sasso and Kalajdzic", (2007) 11 Gaming L. Rev. 554 [*Problem Gamblers and the Duty of Care*]; see also Jasminka Kalajdzic, "Cameron's Rejection of a Duty of Care to Problem Gamblers: A Problematic Defense of Ontario's Gaming Industry", (2008) 12 Gaming L. Rev. 55–59.

> knew or ought reasonably to have known **based on the existence of a self-exclusion [release]**[2]

The author's earlier work on this issue[3] emphasized that a breach of a duty in tort, and a breach of a contractual duty are two separate causes of action.[4] In that work, the author also argued that imposing a duty of care upon casinos has serious public policy and privacy implications in Ontario.[5] The author was careful to comment that "[g]aming venues *may* have a *contractual obligation* to self-identified problem gamblers by virtue of Ontario Lottery and Gaming Corporation's Voluntary Self-Exclusion Program".[6]

In this work, the author discusses precisely why he counselled that Ontario's gaming venues "may" have a contractual obligation (as opposed to more definitive language, like "does"). Many of the references cited in this work still relate to the Province of Ontario, since Sasso & Kalajdzic's *Duty of Care* article dealt specifically with the liability of Ontario's gaming venues. Many of the basic principles of contract law raised within, however, will be applicable throughout the Commonwealth and the United States. The author will approach the issue from two perspectives: lack of consideration and lack of capacity. The author also returns to the lingering question raised by Sasso & Kalajdzic's *Duty of Care* article concerning the possibility of a tortious duty owed to problem gamblers by gaming venues.

B. Consideration

Under Ontario's voluntary self-exclusion program "Request to be Placed on a List of Self-Excluded Persons and Release", it is the problem gambler who self-identifies and signs an undertaking that they wish to be excluded from all Ontario gaming venues for an indefinite period of time.[7] This is the offer; the problem

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[2] William V. Sasso & Jasminka Kalajdzic, "Do Ontario and Its Gaming Venues Owe a Duty of Care to Problem Gamblers?", (2006) 10 Gaming L. Rev. 552 at 25, online: http://www.gamblingresearch.org/download.sz/2206%20Final%20posted%20version%2008Jan07.pdf?docid=7792 [*Duty of Care*] (Emphasis added); See also "Casinos not taking chances in court", *Toronto Star* (5 August 2007), online: Toronto Star <www.thestar.com/printArticle/243348> (the "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").

[3] *Problem with Problem Gaming, supra* note 1.

[4] This demarcation is usually ascribed to Lord Justice Denning in *White v. John Warrick & Co.*, [1953] 2 All. E.R. 1021 at p. 1025, although it is appreciated that actions in negligence often 'result' from an underlying contract (as in surgical procedures, for instance).

[5] *Problem with Problem Gaming, supra* note 1.

[6] *Ibid*. (Emphasis in original).

[7] See Appendix A, "Know Your Limit" obtained in person from Caesar's Windsor Responsible Gaming Information Centre on August 23, 2008 (hereinafter, the "List" or the "Release", as the context dictates).

gambler is the promisee. The gaming venue then undertakes to enforce this self-exclusion using its 'best efforts'. This is the acceptance; the gaming venue is the promisor.

Thomas v. Thomas[8] represents one of the oldest truisms in contract law on consideration. Justice Patteson famously noted the following:

> [c]onsideration means something which is of value in the eye of the law, moving from the plaintiff [i.e. the promisee]; it may be some benefit to the plaintiff [i.e. the promisee], or some detriment to the defendant [i.e. the promisor]; *but at all times must be moving from the plaintiff.*[9]

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 problem gambler from entering the venue. There is nothing which the problem gambler adds to the bargain.[10]

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 notional form of consideration lacks sufficiency and certainty. No economic value could reasonably be attached to a notional 'right' to enter a gaming venue.[11]

If one creates some type of consideration in this situation, as Courts tend to do[12], it is surely be defective or valueless because problem gambling can never be cured.[13] Even if it can be said that a problem gambler has given consideration, as in

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[8] 2 Q.B. 851..

[9] *Ibid.*

[10] See *Terrafund Financial v. 569244 B.C. Ltd.*, [2000] 20 B.L.R. (3d) 104 (S.C.) at para. 25, where the Supreme Court of British Columbia held 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.

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

[12] "[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]" (Bruce MacDougall, *Introduction to Contracts* (Markham: Lexis Nexis) at 95).

[13] Gamblers Anonymous, *Sharing recovery through gamblers anonymous*, 1st ed. (Los Angeles: Gamblers Anonymous Publishing Inc., 1984); see also, Gambler's Anonymous, *Q & A*, online: Gambler's Anonymous <http://www.gamblersanonymous.org/qna.html> ("compulsive gambling is an illness, progressive in its nature, which can never be cured, but can be arrested"); see also, Ferris J, Stripe T. *Gambling in Ontario: a report from a general population survey on gambling-related problems and opinions.* Toronto: Addiction Research Foundation; 1995 ("Both the SOGS [South Oaks Gambling Screen] and the DSM-IV criteria

denial of their rights, such consideration must fail because a problem gambler can never 'truly' contract out of their right to enter a gaming venue, as this is precisely the incurable impulse we are dealing with.

One can point to the language of the Release itself which states there is "consideration for being placed on the List"[14] as evidence that the Ontario Lottery and Gaming Corporation (OLGC) believes consideration to be flowing between the parties in the undertaking. However, the mere wording of the Release is not fatal to the objections raised, since these objections go to the very essence of the transaction itself. It matters not whether the release said "consideration", "valuable consideration" or other similar terminology. The fact remains that any consideration that a mentally-ill problem gambler provides in this situation must be empty, defective, or insufficient. Indeed, the Release also states that the problem gambler has entered into the release "voluntarily"; a proposition which the author will argue in the next section is meaningless if we accept the classification of problem gambling as a serious mental illness.

C. Lack of Capacity

Another vexing issue surrounding the voluntary self-exclusion program is the very nature of problem gambling itself. If we accept that problem gambling is a real and serious mental illness[15], 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*.

If problem gambling deprives an individual of the ability to control their impulses towards gambling[16], how can a contract which seeks to exclude such people from gambling even be considered enforceable? The problem gambler, by definition, lacks the capacity to understand how to control those impulses.[17] And if the problem

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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.").

[14] *Duty of Care*, *supra* note 2 at 9.

[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington D.C., 1994) [remember that, for the moment, the author is using this term interchangeably with pathological gambling, a recognized mental illness, specifically, an impulse control disorder].

[16] *Duty of Care*, *supra* note 2 at 7.

[17] See *Fowler Estate v. Barnes*, [1996] 13 E.T.R. (2d) 150 [Nfld. S.C. (T.D.)] at paras. 25, 26:

> 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**

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

Problem gamblers are in no way exercising their free will in 'voluntarily' self-identifying and entering such contracts. One cannot argue that problem 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.

Scholars will recognize that even if one accepts this argument, 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 problem gambler.[18] This view appears to have been accepted by Canadian Courts.[19] This jurisprudential wisdom is hardly fatal. In fact, when such problem gamblers re-enter the gaming venue they purportedly tried to exclude themselves from, this can reasonably be seen as a rescission of the contract.

There are also significant public policy considerations that ought to be weighed in the enforcement of such self-exclusion Releases. At its core, the Release is an 'agreement' that prohibits the freedom of an individual. If we accept that pathological gambling is a mental illness, then the Release is one which prohibits the freedom of a mentally ill person. It is unconscionable from a public policy standpoint since a mentally ill individual cannot contract to have their movement restricted. One could also argue that there is greater public good in keeping self-identified problem gamblers out of casinos, even if this is a (limited) restriction of their freedom. But there is a competing consideration that such mentally ill problem gamblers are 'contracting' with the very entity that is allegedly making them ill, resulting in a somewhat perverse relationship from a policy standpoint. At the very least, these tough and competing considerations are best left to Parliament to address and not through the intervention of the Courts.

> **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.** (Emphasis added).

[18] G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006) at 158-159 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.).

[19] Professor Fridman cites *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.); *Sawatzky v. Sawatzky* (1986), 48 Sask. R. 161 (Sask. Q.B.).

D. The Claims in Tort

The author would also like to address one final issue – undoubtedly the central issue – raised by Sasso & Kalajdzic's *Duty of Care* article. Namely, whether or not there is a valid contract may be irrelevant to the fact that a self-identified problem gambler arguably puts the gaming venue, 'on notice' that they ought not to enter those gaming premises or any other gaming premise superintended by the OLGC. In other words, even if there is no valid contract, does the whole undertaking (i.e. the Release and List) give rise to liability in tort?

The author will also address a fine (or perhaps grand) distinction that Professor Cameron outlined in her earlier work – the elusive definition of a "problem gambler".[20] Indeed, someone can self-identify as being a problem gambler without *necessarily* being, in the psychiatric sense, a pathological gambler *per se*. Such 'problem gamblers' may simply feel as though they have a 'serious enough' problem that is interfering with their economic and social well-being, and as such, wish to self-exclude from gaming venues without necessarily being a pathological gambler *per se*. There is some support for this distinction in the jurisprudence:

> The disorder [pathological gambling] is recognizable and distinguishable from so called high frequency or problem gambling, which are not pathological, by the fact that the pathological gambler shows a progression in his or her gambling, a preoccupation with gambling, an intolerance for losing and an eventual disregard for the consequences of their gambling. It cannot be emphasized too strongly that the urge to gamble is irresistible for a pathological gambler.[21]

The following analysis, of course, presumes that we can overcome all of the objections raised by Professor Cameron about extending a duty of care in the first place.[22] If we understand a duty of care as being to one's neighbour (i.e. persons so closely affected by the acts or omissions, that I ought to reasonably have had them in contemplation when so acting or failing to act[23]), then the Release and List comes closer to bringing the problem gambler into the definition of neighbour.[24]

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[20] *Problem Gamblers and the Duty of Care*, *supra* note 1

[21] *R. v. Horvath*, [1997] S.J. No. 385 (C.A.) at para. 7 (quoting the testimony of Ozga, a psychiatric nurse trained to treat gambling disorders, according to the Court) [*Horvath*].

[22] *Problem Gamblers*, *supra* note 1.

[23] *Donoghue v. Stevenson*, [1932] A.C. 562 (Lord Atkin's famous formulation of the neighbour principle).

[24] *Problem with Problem Gaming*, *supra* note 1 (It is an altogether separate issue whether *non* self-identified problem gamblers are 'neighbours' under Lord Atkin's famous formulation of the principle. Furthermore, I have already argued against extending such a tortious duty having regard to the competing privacy interests (in particular) that are at stake).

However, the standard of care for that alleged duty is one of reasonable surveillance.[25] The standard recognizes that humans are imperfect.[26] No surveillance system can completely exclude unwanted guests or trespassers. Otherwise we would not be having this debate. So even if there is a duty of care owed to problem gamblers, the standard of that duty is still that of 'reasonable surveillance'. It still does not give rise to tortious liability if the casino[27] 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 we were to hold casino security personnel as being professionals at surveillance, perhaps akin to airport surveillance, it still does not necessarily make them accountable. Especially if it can be demonstrated that problem gamblers (as a 'class'), or a particular problem gambler, has been removed from the gaming venue on several occasions. This would

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[25] *Canada v. Blue Peter Steamships Co.*, [1974] F.C.J. No. 314 (Nfld. F.C.T.D.)(QL). 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 I have no doubt that casino surveillance is a profession as well) adopted Professor Winfield's formulation of the reasonable person in *Winfield on Torts*, 8th ed. (1967) as follows:

> 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**. (Emphasis added).

[26] *Ibid.*

[27] *Problem Gamblers*, *supra* note 1 (I only refer to a *casino's* ability to monitor its patrons).

demonstrate that gaming venues are exercising their alleged duty of care in a reasonable and diligent manner, albeit imperfectly. Furthermore, even if an alleged breach of a duty of care could be established, all of the main defences to a claim in negligence appear applicable.

Volenti non fit injuria seems to apply since the problem gambler is implicitly consenting to the risks involved in his/her gambling. Having been placed on the List, any risk of 'injury' has been 'understood' by the problem gambler (but not a pathological gambler *per se*, as per the distinction in *Horvath*) and has implicitly consented to the risks involved in gambling.

For the 'true' pathological gambler, one could argue that the thrust of my paper thus far has been aimed at showing precisely why such gamblers can never be said to give true consent due to their lack of truly and fully appreciating the risks of their gambling. The criminal jurisprudence on pathological gamblers is frank in this regard. In *R. v. Reshke*[28], Justice Moreau commented that:

> [he is] 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.**[29]

Even though this is within the context of criminal fraud proceedings, the same level of accountability[30] can be said to extend to pathological gamblers who systematically seek out and obtain new lines of credit, evade security, and continue

[28] [2004] A.J. No. 613 (Alta. Q.B.).
[29] *Ibid*. at para. 53 (Emphasis added).
[30] See also, *R. v. Oates*, 2008 SKQB 274 at 53-54 [*Oates*]:

> However, the 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).

their gambling (thereby trespassing – criminally and civilly – on casino property). Contrast this with Justice Belanger's *dicta* in *R. v. Dulmage*[31] (concerning a member of Armed Forces who stole from his employer to support his gambling addition), where he writes that:

> 7 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.
> 8 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.
> 9 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.[32]

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 on the sale of alcohol. Would Justice Belanger advocate that the Government share in the blameworthiness of an alcoholic who kills or seriously injures another in support of their addiction? Or while driving? The author seriously doubts it.

Returning to the defences available to the casino, the 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, in a perverse way, would only be negligent for failing to detect, or enforce, the trespass of the problem gambler onto their premises. Any losses that the problem gambler incurs would be as a result of their 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).[33] After all, problem gamblers do not become mindless automatons due to their illness.[34]

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[31] [2003] O.J. No. 3834 (Ct. J.).
[32] *Ibid*. at paras. 7-9.
[33] 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*, Journal of Gambling Studies, Volume 4, Number 4 / December, 1988. The abstract alone is quite telling:

Even if the problem gambler cannot be seen to be contributorily negligent one could also raise the doctrine of *ex turpi causa non oritur actio*. Since the problem gambler has committed a trespass, the law should not aid the problem gambler in recovering their losses since it would be unjustly enriching the problem gambler for their trespass. Even though the Supreme Court of Canada in *Hall v. Hebert*[35] curtailed the use of the doctrine for actions in negligence[36], Justice McLachlin (as she was then) writing for the majority, specifically noted that:

> 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.

[34] But see *Horvath*, *supra* note 21 at para. 8 (which documented one of the most extreme instances of pathological gambling found in the jurisprudence to date ("Mr. Ozga considered her to be one of the worst cases of a pathological gambler he had ever seen. When asked where he 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."); *Cf. Oates supra* note 30 at para. 52:

> Here, as in *Horvath*, supra, the accused has been diagnosed with having a pathological gambling problem. However, unlike *Horvath*, Ms. Oates 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, Ms. Oates 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.

[35] [1993] 2 S.C.R. 159..
[36] Philip Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law, 2007) at 112.

> [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… 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.[37]

Hall is therefore a restriction on the use of the doctrine where personal injuries are 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[38] from that illegal trespass.

E. Conclusion

In the author's earlier work, it was emphasized that problem gambling (or pathological gambling) is a serious mental illness and that he was in no way disputing this.[39] The same remains true of this work. The author should not be (mis)interpreted as either implicitly or explicitly questioning the existence of problem gambling as a mental illness. The psychiatric validity of the mental illness is a debate best left to scholars in psychiatry and philosophy (although it does add yet another level of complexity to the many competing considerations at stake).[40] The author is only disputing the liability and duties of gaming venues and the OLGC in contract and tort towards problem gamblers. In fact, many of the contract issues raised within this paper squarely emphasize the debilitating nature of the illness, and the strained relationship of the problem gambler to the gaming venue and the OLGC.

A simple solution to the contract problems raised in this paper would appear to lie in a substitute decision maker for the problem gambler. Namely, the substitute decision maker would be the one to enter into the Release on behalf of the problem

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[37] *Ibid*. at paras. 11, 25 (Emphasis added).

[38] *Duty of Care*, *supra* note 2 at 24-25 (acknowledging the inherent difficulties of recovering purely economic losses); *Problem Gamblers*, *supra* note 1 at 570 (Professor Cameron has also drawn attention to this difficulty – and the overall problem it presents for fashioning a remedy for litigious problem gamblers).

[39] *Problem with Problem Gaming*, *supra* note 1.

[40] See T.S. Szasz, "The Myth of Mental Illness" (1960) 15 *Amer. Psychol.* 113.; David Healy, "The Latest Mania: Selling Bipolar Disorder" (2006) 3, 4 PLoS Med e185; T.S. Szasz, "Diagnoses are not Diseases" (1991) 338 Lancet 1574; John Rosencrance, "Compulsive Gambling and the Medicalization of Deviance" (1985) 32 Social Problems 275.

gambler. The substitute decision maker would also have to place the problem gambler's name on the self-excluded persons List. Of course, no solution is simple. The liability, if any, of the substitute decision maker would have to be addressed; and all of the problems associated with grounding liability in tort would still arise (as well, all of the defences in tort would still be available to the gaming venue). At the very least, the use of a substitute decision maker would ensure that the problem gambler is at least 'capable' of entering into a contract. It may also indicate that the problem gambler is receiving the treatment that they require.

Nonetheless, 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 through to pathological gambling, as identified in *Horvath*, adds many more levels of complexity to the enforceability of the Release since there would be varying degrees of 'consent' or 'capacity' dependent upon where along the spectrum a particular problem gambler is situated. Should the Courts intervene in matters of public 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. Responsibility, not liability.

APPENDIX A

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