DO ONTARIO AND ITS GAMING VENUES OWE A DUTY OF CARE TO PROBLEM GAMBLERS?

William V. Sasso
Sutts, Strosberg, LLP

Jasmina Kalajdzic
Sutts, Strosberg, LLP

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“The history of the law of torts has hinged on the tension between the two basic interests of individuals – the interest in security and the interest in freedom of action.”

1) OVERVIEW

A “problem gambler” is broadly defined as any person whose ability to resist the impulse to gamble has been impaired, or whose gambling has compromised, disrupted or damaged personal, family or vocational pursuits. In a 2001 study, it was estimated that 4.8% of adults who gamble are problem gamblers, a rate that translates into approximately 340,000 people in Ontario. Problem Gamblers reportedly contribute 35% of Ontario gaming revenue. Clearly, government-sponsored gambling comes at a significant social cost to a vulnerable segment of society.

Is the Government of Ontario responsible at law for the harm suffered by problem gamblers in the province’s casinos?

To answer this question, one must address two others: Is there a legal duty imposed on the Government and those involved in the operation of the Province’s gaming venues to take positive steps to lessen or eliminate situations of danger or to prevent further financial and other harm to the problem gambler? If such a duty exists, what form of assistance is required to meet that duty?

There are no ready or easy answers to these difficult questions. This novel cause of action has not been considered by Canadian courts. No answer is provided in the Ontario gaming legislation. Problem gamblers do not have any express statutory right of action or remedy nor are they prohibited from seeking redress.

In this paper, the authors examine the legal issue of whether and in which circumstances the Government of Ontario, its agency, Ontario Lottery and Gaming Corporation (OLG), and/or the casinos and the other gaming venues operating under its authority may be obligated at law to compensate problem gamblers or their dependents. The authors conclude that, notwithstanding the absence of express statutory rights and remedies, it is arguable that Ontario, the OLG and gaming venues owe a positive duty of care to assist the problem gambler in certain circumstances. This area of the law will likely develop incrementally, on a case by case basis, with the first successful claim by a problem gambler arising in circumstances where the gaming venue knows the problem gambler and his or her need for assistance but, rather than assisting, continues to profit from the problem gambler's addiction.

2) GAMING LEGISLATION IN ONTARIO

The starting point under Canadian law is that gambling is a common and public nuisance, contrary to public policy, inherently criminal in nature and prohibited under the Criminal Code. The Criminal Code provides for certain exemptions, making lawful certain gaming activities where only prescribed

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4 Criminal Code, R.S. 1985, c.C-46, s. 201 and 206.
conditions are met. Gaming activities that do not fall clearly within the permitted exemptions contravene the Criminal Code prohibition and are illegal.

The Federal Parliament enacted the Bill respecting Criminal Law, Canada’s first Criminal Code, in 1892. That Code banned almost all lotteries and made them criminal offenses. It was not until 1969, when an omnibus bill was passed by the House of Commons, that certain lottery schemes became lawful. The bill constituted a complete recasting of many aspects of the Criminal Code. It permitted four categories of groups or individuals to legally operate lotteries: the Government of Canada, the Government of a Province, certain charitable or religious organizations, as well as agricultural fairs and any organization or person holding a permit duly issued by a Province. In 1985, the Federal Government removed itself from this field and granted to the Provinces and their agencies the sole legal right to conduct or have conducted lotteries and games of chance. The Federal Government did retain, however, the authority to permit and regulate pari-mutuel betting on horse races. Amendments to the Criminal Code in 1985 reflected this and clarified the law that the use of electronic gaming machines, video devices and slot machines was to be within the exclusive domain of the Provincial Governments.

Judicial pronouncements in Canada make it clear that gaming activities continue to be illegal and are not to be condoned unless clearly carried on within the exemption provisions under the Criminal Code.

The Manitoba Court of Appeal in Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation decided that a commercial bingo hall operator was conducting and managing bingo lottery events. The court stated as follows:

> Lotteries have been declared by statute to be common and public nuisances … and they have been categorized as offenses against decency and morality. Apart from the decriminalization of certain lotteries conducted under government regulation, lotteries today remain prohibited by Parliament.

In a 1994 judgment, R. v. Andriopoulous, the Court of Appeal for Ontario determined that unlicensed gaming activities – operating video lottery devices in cafés and social clubs – were illegal. The court stated:

> Section 207 [of the Criminal Code] defines the reach of the crime by stating that it does not extend to lotteries licensed under authority of the province under prescribed conditions. The clear intent is not to condone gaming but to decriminalize it in circumstances where regulations will minimize the potential for public harm. In doing so, section 207 gives no hint that provinces were to regulate such commercial gaming as is here alleged, nor is there any basis for saying that such activity does not remain offensive and under the Criminal Law power of Parliament. The business of organized gaming is the subject matter of the prohibitions, presumably because it invites cheating and attracts other forms of criminal activity. There is no evidence that public perceptions of commercial gaming have been changed or that it is any less criminal in nature than it has ever been.

5 Criminal Code, s. 207.
6 Ibid.
8 Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation, ibid. at 430.
10 R. v. Andriopoulous, ibid. at para. 5.
The Ontario Court of Appeal in an earlier judgment commented on the legislative purpose of the *Criminal Code* relating to offences in relation to lotteries and games of chance. Cory J.A., as he then was, stated:

This section … it is to be noted, is found under the heading “Offence in Relation to Lotteries and Games of Chance.” It is designed to protect persons from those who would exploit people who understandably dream of substantial monetary gains that materialize overnight. Surely, this is a weakness that is common to most members of the family of mankind. The mathematics of pyramid schemes is such that for most participants other than the instigators the end result must be the loss of their investment.11

The *Criminal Code* provides for certain exemptions in section 207 making lawful gaming activities where the prescribed conditions are met. Section 207 of the *Criminal Code* reads in part as follows:

207(1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province…12

The essential requirement under this exemption provision of the *Criminal Code* is that the lottery scheme be “conducted and managed” by the Government of a Province.

In December, 1993 the Ontario Government, acting under the exemption provided in section 207(1)(a) of the *Criminal Code*, enacted new legislation establishing the Ontario Casino Corporation (the “OCC”). The *Ontario Casino Corporation Act, 1993* created the OCC which had among its objects:

(i) to conduct and manage games of chance, and

(ii) to provide for the operation of casinos.13

The Ontario Government at the same time enacted complementary amendments to *The Gaming Control Act* (the “GCA”) to establish a regime for the regulation of casinos, being places in which lottery schemes conducted and managed by the OCC, were to be carried out. The Gaming Control Corporation (“GCC”) created under the provisions of the GCA was charged with the legislative mandate to administer the GCA and the regulations “in the public interest and in accordance with the principles of honesty and integrity.”14 The role of the GCC as regulator included, among other things:

(i) enforcing registration requirements and regulating the conduct of persons who supply goods or services to a casino operation;

(ii) approving the actual goods and services supplied in a casino operation;

(iii) approving the games of chance used in a casino operation; and

(iv) approving the operation of a casino.15

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13 *Ontario Casino Corporation Act, 1993*, S.O. 1993, c.25, s. 5.
14 *Alcohol and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c.26, s.3(3).
On the basis of this legislative framework, the Ontario Government adopted the “government ownership/private operator model” for the operation of casinos and the management of games of chance. Under casino operating agreements, the operator is to establish and the OCC is to approve policies with respect to the operation of a particular casino. The OCC appoints the private operator as OCC’s sole and exclusive agent to operate on its behalf the games of chance to be carried on in the casino. The operator’s activities are subject to the provisions of the operating agreement, the approved operating policies and the operating budget. The casino’s games of chance are defined as a lottery scheme conducted and managed by the Ontario Government under section 207(1)(a) of the Criminal Code.

The OCCA was repealed on April 1, 2000 and replaced with the Ontario Lottery and Gaming Corporation Act, 1999\(^\text{16}\), replacing the OCC with the newly created OLG which was granted similar objects and responsibilities as its predecessor in respect of casino operations.

It is beyond the scope of this report to examine in any further detail the agency relationship between the casino operator, OLG and the Ontario Government and the responsibility of the Government for the conduct of the private operator. It should suffice for present purposes to consider the relationship between the operator and OLG/Ontario as that of principal and agent as would appear to be required under the provisions of the Criminal Code, thereby making Ontario responsible for any actions or omissions of the agent. Indeed, because the obligation to conduct and manage under section 207(1)(a) of the Criminal Code is conferred exclusively on the government of a province, it would appear that Ontario must bear responsibility for the manner in which the casinos are managed and operated. Given the creditworthiness of Ontario’s casinos, the issue of vicarious liability may prove to be only a matter of academic interest in a civil action. However, the political ramifications of judicial pronouncements on the Government’s responsibility towards problem gamblers may be another matter.

3) DEFINITION OF PROBLEM GAMBLING

The American Psychiatric Association (APA) has recognized “compulsive” or “problem” gambling as a mental disorder. APA’s Diagnostic and Statistical Manual of Mental Disorders (“DSM”) classifies “pathological” gambling as an impulse control disorder. An impulse control disorder is a failure to resist an impulse, drive, or temptation to perform some act that is harmful to the person or others. The APA states:

The essential features of this disorder are a chronic and progressive failure to resist impulses to gamble, and gambling behaviour that compromises, disrupts or damages personal, family or vocational pursuits. The gambling preoccupation, urge and activity increase during periods of stress. Problems that arise as a result of the gambling lead to an intensification of the gambling behaviour. Characteristic problems include extensive indebtedness and consequent default on debts and other financial responsibilities, disrupted family relationships, inattention at work, and financially motivated illegal activities to pay for gambling.\(^\text{17}\)

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\(^{16}\) Ontario Lottery and Gaming Corporation Act, 1990, S.O. 1999, Chapter 12, Schedule L.

The DSM definition of pathological gambling as an impulse control problem has been accepted by the Canadian mental health community. Similarly, the World Health Organization also recognizes compulsive gambling as a mental disease.\textsuperscript{18}

At least one province has expressly recognized problem gambling in its gaming legislation and regulations. Under section 2(c) of its \textit{Gaming Control Act},\textsuperscript{19} Nova Scotia specifically states that one of the purposes of the Act is to “ensure that any measures taken with respect to casinos and other lottery schemes are undertaken for the public good and in the best interests of the public, and, without limiting the generality of the foregoing, to minimize the opportunities that give rise to problem gambling and other illness, crime and social disruption.” Pursuant to its Casino Regulations, casino operators are prohibited from permitting certain categories of persons to play games of chance, including “\textbf{individuals who appear to be addicted to gambling}, and the casino operator shall implement policies and procedures designed to \textbf{identify individuals exhibiting behaviour evidencing a problem with gambling}.”\textsuperscript{20}

In contrast, the Government of Ontario has referred to problem gambling only fleetingly in its legislation: under section 32(3) of Ontario Regulation 385/99 pursuant to the \textit{Gaming Control Act}, an operator is required to implement and comply with a program to “identify players who may have a problem with or addiction to gambling”, but only if so required by the Registrar of Alcohol and Gaming. The Registrar has not demanded such a program. In other ways, however, the Province has acknowledged that pathological gambling is a social problem. The Government provides for a percentage of the gross revenues from Ontario gambling operations in charity casinos and racetrack slot operations to be used to fund research, prevention and treatment of problem gambling. One of the recipients of that funding is the Ontario Problem Gambling Research Centre which uses the funding to develop and apply knowledge about problem gambling.

The Government has also created a program known as the “Ontario Problem Gambling Helpline”, which program is sponsored by the Drug and Alcohol Registry of Treatment (DART) and is managed by the Ontario Ministry of Health and Long-Term Care.\textsuperscript{21} The Ontario Problem Gambling Helpline operates at all time and its “Directory of Problem Gambling Treatment Services in Ontario” lists no less than 48 problem gambling treatment services centres currently operating in Ontario.\textsuperscript{22}

There are also pilot projects funded by the Ontario Ministry of Health and Long-Term Care which focus on problem gambling specific to ethno-cultural populations, seniors, women, and youth.\textsuperscript{23} Services such as individual and group counseling, assessment and treatment are offered, and such services are available in 140 languages.\textsuperscript{24} These examples of the widespread public recognition of problem gambling and the need for the treatment of the significant social and medical problems caused by problem gamblers may be considered by the court in any future claim relating to problem gambling.

\textsuperscript{19} 1994-95, c.4.
\textsuperscript{21} Ontario Problem Gambling Helpline (http://www.opgh.on.ca/main.htm).
\textsuperscript{22} \textit{Ibid} (http://www.opgh.on.ca/DART/owalive/opgh_dir_intro_newDB/intro_page_newDB).
\textsuperscript{23} Ontario Substance Abuse Bureau (http://sano.camh.net/resource/specpop.htm).
\textsuperscript{24} \textit{Ibid}. 
4) VOLUNTARY SELF-EXCLUSION AND OTHER MEANS OF IDENTIFYING PROBLEM GAMBLERS

Another approach to dealing with problem gambling that has been undertaken by the OLG is the Self-Exclusion Program.\(^25\)

The Request to be Placed on the Self-Exclusion List and Release (“Self-Exclusion Request”) is a written request made by a person who recognizes that he or she has a control problem with respect to gambling and should be refused entry to all OLG gaming venues. The period of exclusion in the Form is indefinite, but reinstatement will not be considered until a minimum of six months have passed from the date of self-exclusion. Following that minimum period, the person may request reinstatement in writing to any of the OLG gaming venues. After a further thirty-day waiting period, he or she will again become eligible for re-entry to all OLG gaming venues.

The Self-Exclusion Request reads, in part, as follows:

I request to be placed on the Ontario Lottery and Gaming Corporation’s (OLGC) list of self-excluded persons (the “List”). I acknowledge that it is solely my responsibility to refrain from visiting an OLGC gaming facility and gambling in the future. I also acknowledge receipt of the toll-free phone number for the Ontario Problem Gambling Hotline, and that it is my responsibility and decision whether or not to seek treatment or counselling.

I understand that, as a result of being placed on the List, OLGC and the commercial casinos will, within a reasonable time period, remove me from their mailing lists. I understand, however, that I may receive marketing materials to the extent mailings have already been initiated and cannot be stopped. I understand that I will become ineligible to participate in any players’ programs, and promotional offers. I confirm that I have either returned all players’ cards in my possession or undertake to destroy them.

I acknowledge and agree that OLGC, the private operators of OLGC gaming facilities, and their respective agents and employees, have no responsibility or obligation to keep or prevent me from entering an OLGC gaming facility, to remove me should I enter, or to stop me from gambling.

I confirm that this form constitutes written notice under the Trespass to Property Act that my entry onto an OLGC gaming facility is not permitted, and that I may be arrested and charged for trespass without further notice or warning should I enter an Ontario gaming facility.

In consideration for being placed on the List, I agree to release and not to sue the Province of Ontario, the OLGC, all private operators of OLGC gaming facilities and their respective agents and employees, from and for any claims or causes of action that I have or may have arising out of any act or omission, relating to the processing, implementation or enforcement of this request to be placed on the List, including the forwarding of the contents of this request to any OLGC gaming facility, private operator of such facilities, or their agent or employees, or for any financial loss, physical injury or emotional distress or any breach of confidentiality that may occur as a result.

\(^{25}\) A copy of the Request to be Placed on the Self-Exclusion List and Release, and the accompanying description of the Program entitled “Over Your Limit?”, is included in Appendix A of this report.
In the Self-Exclusion Request, OLG expresses no commitment to make any effort to exclude entry to the person signing the Request, nor to stop the self-excluded person from gambling if he or she gains entry. The Self-Exclusion Request also purports to release OLG, the commercial operator and their respective agents and employees from any liability arising from the “implementation and enforcement” – or presumably, the lack thereof– of the Request. Whether this language insulates OLG from liability in a breach of contract claim is not at issue in this report. For the purposes of tort law, it may be argued that the Request’s exculpatory language does not release OLG and the commercial operators from liability resulting from their failure to use best efforts to exclude entry to that person, as required by the relevant standard of care. Indeed, by regulation the operator is mandated not to permit self-excluded persons to play games of chance at the premises. The execution and receipt of the Self-Exclusion Request is, at the very least, evidence of the knowledge possessed by casino operators and OLG of a problem gambler’s condition, and is relevant, therefore, to the determination of the existence of a duty of care.

In practice, the Self-Exclusion Request is signed by the person requesting exclusion and by a representative of the casino, and the self-excluded person’s patron file is marked accordingly. The casino requires that photographs be taken and personal information be obtained from that person for the purpose of identifying the person requesting the voluntary ban. The Request and the photographs are then given to security and surveillance personnel at all OLG gaming sites, who keep the information in large binders. There is no statistical evidence available to measure the success rate of casino security personnel in identifying self-excluded persons who attempt to gain entry. Anecdotal evidence provided to the authors by several problem gamblers and casino employees, however, suggests that the success rate is very low. Other than removing the self-excluded person’s name from mailing lists, it appears that no other steps are taken by the casino receiving the Request for the purpose of preventing self-excluded persons from further entry during the period of voluntary ban. Ultimately a court will have to determine whether these actions on the part of the casino receiving the self-exclusion form are sufficient to establish that the operator met the reasonable standard of care in circumstances where a problem gambler has identified himself or herself as such and has expressly asked the casino for assistance.

In addition to the aforementioned self-identification program, there are a number of prescribed active monitoring provisions. As examples, when gambling in amounts that exceed $2,500, gamblers are required to register with the casino. When gambling in amounts that exceed $10,000, gamblers are required to register with the casino and provide some further personal financial information. The aforementioned information is collected and monitored.

Casinos also monitor gamblers to whom they provide credit. Applications for credit are made in writing to the casino and, where credit is provided, it is done after a “cool-down” period between the time of the application for credit and the provision of credit to that applicant. Casinos additionally have a great deal of information concerning the gambling habits of those who participate in programs, such as Players Prestige Club and Winner’s Circle, that are designed to encourage gambling and provide “perks & privileges” for frequent use. For example, a Players Prestige gambler who uses his card in the card reader of his favourite slot machine and leaves it inserted for the duration of play will accumulate points which can be redeemed for “Cash Back” for additional slot play and will also earn reward points for food, beverages, rooms and other perquisites at the casino. These cards also disclose the number

of visits, the duration of the visit, and the amount of money spent – all indicators that could be used to identify a person with a gambling control problem.

Regardless of the manner in which or the purpose for which the information is obtained, casinos possess a great deal of information on the gambling habits of their patrons or a significant number of them. They have the ability, of course, to obtain such additional information on the gambling habits of every person who gambles at their establishments as they may require, using the same monitoring techniques, for example, that are currently used to identify cheaters.

5) **ACCIDENTAL, NEGLIGENT, OR INTENTIONAL MISCONDUCT**

Generally speaking, any legal cause of action will depend on where the conduct at issue falls along the continuum of accidental, negligent or intentional conduct.

(a) **Accidental**

Where the person acts and produces consequences which are either not reasonably foreseeable or not reasonably preventable, the conduct that produced the result may be seen as accidental. Applied to a problem gambler’s claim, casinos are aware that, collectively and on average, gamblers always lose and the gaming venue always wins. Studies would appear to indicate that for all bets on slots, roulette, blackjack, craps, video poker and Texas Hold’em, the average percentage of loss by gamblers and gain by gaming operators per bet is between 3% and 15%.\(^{29}\) Whether it is $1 in $20, $5 in $50, or any other percentage of the total bets placed, gamblers must collectively lose a certain percentage of the total amount bet in every game of chance.

Problem gambling is recognized as a disorder that reduces the person’s ability to stop gambling when it is causing significant economic harm. It therefore appears to be virtually certain that ready access to gaming venues will provide the temptation and opportunities that will be difficult to resist for the problem gambler and inevitably lead to gambling losses by them. Moreover, they will be particularly susceptible to inducements and other forms of encouragement to gamble.

Problem gamblers are generally recognized as a group that is at particular risk when there is public access at large to gaming venues in Ontario. Moreover, the venue operators may be taken to have reasonably foreseen that, in permitting unlimited access to problem gamblers, there will be losses or harm to them. In this respect, the casino operators’ conduct in permitting access to known problem gamblers cannot be considered as accidental. Moreover, because inducements to gamble increase with one’s losses by virtue of programs like the Winner’s Circle, casino operators may, in fact, be viewed as actively soliciting gamblers with a higher probability of dependency.

The determination of whether the adverse consequences to problem gamblers are reasonably preventable may be a more difficult analysis for the court. As a result of their disability, problem gamblers desire to engage in the activity that is causing them harm. The objective of the law is not to absolve addicts or persons with a disorder from all responsibility; rather, it is to protect them from abuse by those in special positions of power over them. In order for the casino operator to prevent

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harm, the operator must not only be able to identify them as likely problem gamblers but also be able to take steps in a reasonable manner to prevent the problem gamblers from harming themselves.

(b) Intentional

The deliberate conduct at the other end of the continuum may be dealt with more summarily. Where a casino operates either knowing with substantial certainty what the consequences of its actions will be or desires them, the casino operator can be said to have intended those consequences. There may be cases where an unscrupulous casino operator or employee engages in such conduct as targeting a known problem gambler, enticing him to come to the establishment, providing him with credit, plying him with alcohol to further impair his judgment, and does such things with the intended purpose of causing him to lose money gambling. Where such an operator, for its own profit, has victimized a person who cannot help himself, the law will have little difficulty in fashioning a remedy for the problem gambler to prevent his victimization and the corresponding enrichment of the operator.

(c) Negligence

While there may be some cases of intentional misconduct, the vast majority of cases will undoubtedly arise in situations that are not at the opposite ends of the conduct continuum and will be left to be determined applying principles of negligence law.

In framing the issue in negligence, it must be determined whether the casino operator ought to have reasonably foreseen and avoided the conduct that led to the loss or harm to the problem gambler. That loss results from giving the problem gambler access to the gaming venues. That loss can apparently only be prevented by denying the problem gambler access to the gaming venues that is provided to the public at large, assuming that he can be identified as a problem gambler before he begins to gamble, or by confronting him and facilitating access to assistance if the person exhibits the characteristics of a problem gambler while gambling at the establishment.

At its essence, the issue is whether the operator is under a legal duty to exclude or otherwise respond to those who exhibit the characteristics of a problem gambler in order to prevent them from causing further harm or loss to themselves and/or to others who may reasonably suffer as a consequence of their continuing losses. It is worth noting that in 2004, an appeals court in Austria decided this issue in favour of a pathological gambler who lost his business and tried to take his life after running up huge debts on casino blackjack tables and roulette wheels. The court ruled that Christian Hainz, who had visited two casinos belonging to Casinos Austria more than one hundred times between 1997 and 2000, should be reimbursed the equivalent of about $682,000, representing approximately 20% of his gambling losses. The court upheld the trial judge’s findings that Casinos Austria was guilty of “gross malfeasance and negligent behaviour” by not doing enough research into their patron’s financial resources, and for failing to restrict the actions of a person who had all the signs of a pathological gambler.  

6) DUTY OF CARE

The framework within which the existence of a novel tort of negligence in respect of problem gamblers must be considered is the so-called “Ann's test”, flowing from the decision of the House of Lords in Ann's v. London Borough of Merton31, as applied and restated in Canada in Cooper v. Hobart32 and

30 Michael Leidig, “Gambling addict wins a fortune in court ruling against casino”, The Telegraph (22 February 2004) (available on line at news.telegraph.co.uk)
**Odhavji Estate v. Woodhouse.**33 These cases stand for the proposition that in order to establish the existence of a duty of care, a person must establish, as expressed by Iacobucci J. in *Odhavji Estate* at para. 52:

(i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty.34

The real focus of debate surrounding whether there should be a novel tort is the second branch of the *Anns* test, as reflected in the third factor listed in *Odhavji Estate* – are there policy reasons for denying the existence of a duty of care? In *Cooper v. Hobart* at paras. 37-38, the Supreme Court of Canada articulated several criteria to be considered under the second branch of the *Anns* test: Does the law already provide a remedy in respect of the loss complained of? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Is the impugned conduct operational in nature, or is it in the nature of governmental or legislative policy making? Did the impugned conduct take place in the performance of a quasi-judicial function?

There are no alternative remedies provided at law to the problem gambler. In circumstances where the casino operator knows the problem gambler and his need for assistance but, rather than assisting, continues to profit from the gambler’s addiction, the recognition of a duty of care to the problem gambler would not appear to create the spectre of unlimited liability to an unlimited class. Finally, the conduct is operational in nature relating to the management of gaming venues in the public interest in accordance with the principles of honesty and integrity. In summary, none of the policy arguments mentioned in *Cooper v. Hobart* appear to favour casino operators’ immunity from the law of negligence.

In *Cooper v. Hobart*, McLachlin C.J.C. and Major J. observed that “the second stage of *Anns* will seldom arise and...questions of liability will be determined primarily by reference to established and analogous categories of recovery.”35 There are two analogous categories relevant to this analysis: the more established category of commercial host liability with respect to the sale of alcoholic beverages; and the more recent, but more directly applicable, category of lottery ticket purchasers.

7) **LOTTERY TICKET PURCHASERS**

In late October 2006, the CBC news show *Fifth Estate* made public a 2005 mid-trial ruling on the existence of a duty of care by OLG to a lottery ticket winner named Edmonds. In *Edmonds v. Laplante*,36 the plaintiff alleged that a retail seller of lottery tickets defrauded him out of a $250,000 winning ticket. He brought suit against the retailer but also named OLG as a party defendant on the basis that OLG was negligent in failing to prevent its agents – retail vendors of its lottery tickets – from causing harm to the buying public. In the course of the trial, OLG asked the judge to determine if OLG owed a duty of care to Mr. Edmonds as a matter of law. The answer, of course, was critical to the case. If answered in the negative, Mr. Edmonds could not succeed in a negligence action against OLG and the case would be dismissed.

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34 Ibid.
35 *Cooper v. Hobart*, supra note 33 at para. 39
Sachs J. determined that OLG did owe a duty of care. In coming to her conclusion, she engaged in the very analysis explored in this report. She performed an *Anns* analysis to determine if the relationship between OLG and Mr. Edmonds gave rise to a duty of care.

Applying the first branch of the *Anns* test, Sachs J. concluded that both reasonable foreseeability of harm and proximity were established. With respect to foreseeability, she found that OLG has “acknowledged the real possibility that a retailer could gain an unfair advantage in the conduct of the games and try to claim a customer’s ticket as their own.” She construed OLG’s adoption of the “insider win policy”, which subjected retailers and their employees to a higher level of scrutiny when they come to claim a prize, was sufficient evidence of such acknowledgement.

As to proximity, Sachs J. concluded that the relationship between OLG and Mr. Edmonds was analogous to one of the recognized categories listed in *Cooper v. Hobart*, namely, governmental authorities who have undertaken a policy of road maintenance and who are obligated to execute the maintenance in a non-negligent manner.

Sachs J.’s analysis of the first branch in *Anns* is as applicable in a problem gambling context as it is in the context of lottery ticket purchasers. By adopting self-exclusion policies, funding treatment and prevention resources, the Ontario Problem Gambling Research Centre and other related initiatives, it could well be argued that OLG has acknowledged the risk posed to problem gamblers by unrestricted access to gaming venues. Further, having undertaken to provide gaming activities in a socially responsible manner, it could also be argued that proximity is proven.

Moreover, there would be no need to establish proximity by analogy to the category of government authorities undertaking road maintenance. A problem gambler can now forcefully argue that there is proximity by analogy to the category recognized by Sachs J.: lottery ticket purchasers.

Sachs J. also dealt with policy arguments, as she was required to do under the second branch of *Anns*. She rejected three arguments raised by OLG. First, she found nothing in the governing legislation and regulations that exempts OLG from liability. Second, she rejected the argument that OLG should not be liable for policy decisions, stating that OLG’s alleged negligent execution of its “insider win policy” was an operational decision that was not immune to suit. Finally, Sachs J. summarily dismissed the oft-repeated warning that the recognition of a duty would create the spectre of an unlimited liability to an unlimited class of people.

The judge’s policy analysis is apposite to the problem gambling context. If nothing in the governing legislation exempts OLG from liability in the lottery case, there is likely nothing in the legislation to exempt OLG from liability in the problem gambling context. The authors’ findings in regard to the statutory context support this conclusion and are explained part (2) of this report.

Similarly, failing to act on data available to gambling providers and ignoring empirical and social science evidence of the indicia of problem gambling could well be construed as operational decisions, not government policy. And if the spectre of unlimited liability to an unlimited class is rejected vis-à-vis lottery ticket purchasers, whose numbers and losses do not obviously differ in a significant way from those of problem gamblers, there may similarly be no such fear to drive a court to reject a duty of care on policy grounds.

37 *Edmonds v. Laplante et al.* (March 15, 2005) [unreported] at p. 5.
38 *Cooper v. Hobart*, supra note 33.
The importance of the Edmonds case, which settled midway through Sachs J.’s charge to the jury, should not be underestimated. Not only does the decision confirm the likelihood that, given the right facts, a plaintiff could satisfy the Anns test and establish a duty of care owed to him or her, but it also raises the question as to whether a court needs to engage Anns at all. It is worth repeating that a court need not proceed with the Anns analysis if the relationship between the parties falls within a category of relationships that case law has recognized as giving rise to a duty of care. A problem gambler might establish a duty of care simply by convincing a court that Edmonds determined that all patrons of the gaming activities and lotteries provided by gaming venues fall within the category of those to whom OLG owes a duty of care.

8) COMMERCIAL HOST LIABILITY

The other, more developed category of recovery to which a court will turn in its analysis of duty of care is the commercial host category. When a problem gambler claim is brought to trial in an Ontario court, one of the first questions that will be asked is whether the principles of law applicable to commercial host liability with respect to the sale of alcoholic beverages in Ontario may evolve into the arena of gambling liability.

It has been confidently predicted that the law will fashion remedies for the problem gambler “that will be needed to bring this risky behaviour into line with the responsibilities that have been imposed upon the alcohol industry.” That confident prognostication requires careful analysis.

The leading Canadian case on commercial host liability for those who are licensed to serve alcohol is Jordan House Limited v. Menow. Over three decades have passed since the Supreme Court of Canada delivered that landmark decision in which the court determined that an innkeeper and his staff owed a duty of care in certain circumstances to its patrons. That decision provides a useful framework to consider the issue of whether the operator of a casino may be charged with a similar duty of care to a known problem gambler to take reasonable care to safeguard that gambler from the likely risk of economic loss and other harm or damage.

The facts of the Menow case are straightforward. The hotel fronted on a much traveled highway between Hamilton and Niagara Falls, Ontario. Menow was a frequent patron of the hotel’s beverage room and was well known to the owner/operator of the hotel and to his staff. Menow was employed by a fruit farmer and lived alone on his employer’s farm, which was on a side road about 2½ miles from the hotel, with the direct route to his residence being along the highway to the side road. Menow regularly drank to excess at the hotel and then acted recklessly. The hotel management and the beverage room employees knew of his propensities. About a year before the events out of which the case arose, Menow had been barred from the hotel for a period of time because he annoyed other customers after drinking excessively. Thereafter, the hotel’s employees were instructed not to serve him unless he was accompanied by a responsible person.

On the winter night in question, Menow arrived at the hotel with others and was permitted entry. His companions departed within a short time leaving him there to drink alone. He drank for a period of

41 A full analysis on duty of care and novel causes of action has been examined by the Supreme Court of Canada in Kamloops (City) v. Nielson, [1984] 2 S.C.R. 2
approximately five hours, the hotel having sold alcohol to him well past the point of visible or apparent intoxication. When Menow began to wander around the beverage room, to the annoyance of other customers and staff, he was ejected from the hotel with the hotel owner/operator and the staff who ejected him knowing that: (i) he was unable to take care of himself by reason of intoxication; and (ii) he was required to find his way to his residence, probably traveling by foot, along the dangerous route of the main highway. A short time later, Menow was struck by a vehicle as he was staggering near the centre of the highway.42

The trial judge found that the hotel owed and was in breach of a common law duty of care to Menow. The trial judge placed the duty of care on two grounds, each related to the breach of certain statutory obligations:

(a) the breach of section 53(3) of The Liquor Licence Act, R.S.O. 1960, c.218 and section 81 of The Liquor Control Act, R.S.O. 1960, c.217, which prohibit the sale by a licensed hotel operator of alcohol to a visibly intoxicated person; and

(b) the breach of section 53(4) and (6) of The Liquor Licence Act, which imposes a duty on a licensed hotel operator to eject an intoxicated patron, as qualified by trial judge’s determination that, when ejecting an intoxicated patron, there was an implied duty not to subject that patron to danger of personal injury foreseeable as a result of the ejection.

The trial judge found that these statutory provisions indicated a standard upon which a common law duty could be grounded and that the hotel owner/operator and its employees conducted themselves in breach of that duty on the facts of the case. The trial judge did not hold that the mere breach of the statutory enactments and the fact that Menow suffered personal injury were enough to attach civil liability to the hotel, but rather considered the statutory enactments in determining, on common law principles, whether a duty of care should be raised in favour of Menow against the hotel.

In brief oral reasons, the Ontario Court of Appeal dismissed the appeal stating that “we place our dismissal of the appeal on the simple ground that, so far as the hotel is concerned, there was a breach of the common law duty of care owed to the plaintiff in the circumstances of this case”.43

On appeal to the Supreme Court of Canada, the court unanimously dismissed the appeal and agreed with Menow that the hotel had an obligation to take reasonable care to protect him, in his intoxicated condition, from personal injury. Laskin J. (as he then was) stated that the applicable principles of law were as follows:

The common law assesses liability for negligence on the basis of breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. This is the generality which exhibits the flexibility of the common law; but since liability is predicated upon fault, the guiding principle assumes a nexus or relationship between the injured person and the injuring person which makes it reasonable to conclude that the latter owes a duty to the former not to expose him to an unreasonable risk of harm. Moreover, in considering whether the risk of injury to which a person may be exposed is one that he should not reasonably have to run, it is relevant to relate the probability and the gravity of injury to the burden that would be imposed upon the prospective defendant in taking avoiding measures. Bolton v. Stone, [1951] A.C. 850 in the House of Lords and Lambert v. Lastoplex Chemicals Co. Ltd., [1972]

42 Jordan House v. Menow, supra note 41 at 241-243
43 Jordan House v. Menow, ibid. at 244.
S.C.R. 569 in this Court illustrate the relationship between the remoteness or likelihood of injury and the fixing of an obligation to take preventive measures according to the gravity thereof.44

Laskin J. observed that Menow created a risk of injury to himself by excessive drinking on the night in question and stated that, if the hotel’s only involvement was the supplying of the alcohol consumed by Menow, it would be difficult to support the imposition of common law liability for the injuries suffered by him. Laskin J. further commented that a special relationship is required before a duty of care can be imposed at law and that, as an example, the mere observance of an intoxicated person by other patrons or users of the highway imposes at law no common law duty upon them to be a Good Samaritan and steer the intoxicated person out of harm’s way. Rather, liability was imposed in the circumstances because the hotel was in an invitor-invitee relationship with Menow as one of its patrons, and it was aware, through its employees, of his intoxicated condition, a condition which, on the findings of the trial judge, it fed in violation of applicable liquor licence and liquor control legislation.45

In next considering the consequences of imposing an obligation upon the hotel to take preventive measures, Laskin J. observed that there is nothing unreasonable in calling upon the hotel in such circumstances to take reasonable care to see that Menow is not exposed to injury because of his intoxication and that no inordinate burden would be placed upon the hotel obliging it to respond to Menow’s need for protection. He stated:

Given the relationship between Menow and the hotel, the hotel operator’s knowledge of Menow’s propensity to drink and his instruction to his employees not to serve him unless he was accompanied by a responsible person, the fact that Menow was served not only in breach of this instruction but as well in breach of statutory injunctions against serving a patron who was apparently in an intoxicated condition, and the fact that the hotel operator was aware that Menow was intoxicated, the proper conclusion is that the hotel came under a duty to Menow to see that he got home safely by taking him under its charge or putting him under the charge of a responsible person, or to see that he was not turned out alone until he was in a reasonably fit condition to look after himself. There was, in this case, a breach of this duty for which the hotel must respond according to the degree of fault found against it. The harm that ensued was that which was reasonably foreseeable by reason of what the hotel did (in turning Menow out) and failed to do (in not taking preventive measures).46

Laskin J. concluded his reasons with the observation that the result to which he came in that case does not mean that he would impose “a duty on every tavern owner to act as a watchdog for all patrons who enter his place of business and drink to excess”. In concurring reasons, however, Ritchie J. went further by suggesting that the staff violated their duty once they served Menow past the point of intoxication. Their obligation was to prevent intoxication and not, as Laskin J. had ruled, simply to protect patrons once they became intoxicated.47

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44 Jordan House v. Menow, ibid. at 247.
45 Jordan House v. Menow, ibid. at 248.
46 Jordan House v. Menow, ibid. at 249.
47 Jordan House v. Menow, ibid. at 251.
9) APPLYING MENOW TO THE PROBLEM GAMBLER CONTEXT

It is abundantly clear from the reasons in Menow that, in determining commercial host liability, a great deal turns on the knowledge of the operator (or his employees) of the patron and the patron’s condition at the time of the events in issue.

In the evolution of the common law, the casino operator’s liability to the problem gambler will be considered in light of the principles on which liability was founded in the Menow case. In so doing, the court must first deal with the specific relationship between the problem gambler, on the one hand, and the casino operator and its staff, on the other. To found liability on Menow principles, the casino management and/or employees would be required to have specific knowledge of the propensities of the problem gambler advancing the claim. Menow was well known to the hotel owner/operator and its employees and, similarly, there will be problem gamblers 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 Request or in some other manner. There will also be persons who have been identified as problem gamblers by their doctors, families, employers or law enforcement authorities or who have been observed by casino management staff as having the control problems exhibited by problem gamblers. Regardless of the manner in which the casino operator and its staff become aware of the identity of the problem gambler and his need for assistance, that knowledge would appear to be a prerequisite for founding liability on Menow principles.

A less conservative approach on the issue of knowledge of the casino operator would be to impute knowledge on the basis of data available to casinos by reason of the Winner’s Circle and other preferred customer or loyalty programs. By virtue of those programs, a gambler’s frequency of visits, gambling losses and duration of play are all known to the casino operators. That casino operators ignore such data may be no more a defence than is a barkeeper’s installation of a screen between the bartender and his patrons. In Picka Estate v. Porter, the Ontario Court of Appeal confirmed a finding of liability against the Legion club stating it had a duty not to supply the patron with so much beer as to intoxicate him and that it had “failed in its duty by making no effort to see Mr. Porter’s condition and by having a system of distributing beer which made seeing the condition of Mr. Porter extremely difficult.”

Second, the court will be required to consider the issue of the responsibility of the problem gambler for his own actions. Similar to Menow and other persons with a drinking problem, the problem gambler is not being forced to either drink or gamble or do both. The problem gambler goes to the casino because he wishes to gamble. His gambling losses are self-imposed. Like Menow, the problem gambler advancing the claim will be required to overcome the natural propensity of judges to, quite understandably, require the claimant to provide some cogent reason why he should not be required to assume full responsibility for the consequences of his own actions. Ontario judges may be more inclined to provide remedies where, on the facts of a particular case, the casino operator may be found to be taking advantage of persons whose condition renders them less capable of helping themselves. A middle ground may be to apportion liability for the gambler’s harm between the problem gambler and the casino; the extent of the problem gambler’s contributory negligence would necessarily depend on the circumstances of the case.

49 Ibid, at para. 13, per Zuber J.A.
While the Menow case may provide an analytical framework for the imposition of a duty of care in circumstances where the problem gambler is known as such to the casino operator and/or its staff, it does not support the imposition of a legal duty upon a casino operator to engage actively in a process of pre-screening all patrons for the purpose of identifying persons that exhibit the characteristics of a problem gambler and to take positive steps to exclude them, any more than the liquor laws would impose a duty on hotel operators to pre-screen patrons for the purpose of determining whether they exhibit the characteristics of a problem drinker and take positive steps to exclude them.

Menow is also distinguishable from the problem gambling context in several important ways; unlike the circumstances in Menow where the danger was on the dark public highway outside the hotel, the danger to the problem gambler lies in wait within the casino. Is there a duty not to serve problem gamblers implied in the gambling statutes that is akin to the duty not to serve apparently intoxicated persons provided for in the liquor statutes? As stated by Laskin J., the common law assesses liability for negligence on the basis of a breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. The foreseeable and unreasonable risk of harm to the problem gambler is found at the gaming table or machine. The court will be required to determine in the circumstances of the particular case that the casino owed a duty to the problem gambler not to expose him to an unreasonable risk of harm by permitting him to either start or continue to gamble.

Like the hotel operator, the casino operator has the power to eject patrons. In the case of the hotel operator, he has not only the power but the duty to eject intoxicated patrons. The only practical way to prevent harm to the problem gambler appears to be his or her exclusion from the gaming venue. If that is correct, does the casino operator have a corresponding duty to eject problem gamblers for their own safety, or to confront the gambler, express concern about his level of losses and facilitate access to a treatment program? Having particular regard to the probability and the gravity of injury to the problem gambler, the burden that would be imposed upon the casino in taking this avoidance measure does not appear to be unduly onerous. But this duty to take affirmative action to eject would be confined to self-identified problem gamblers and any other person who has clearly demonstrated to the casino operator and staff that he or she is a problem gambler with impaired ability to resist the impulse to gamble even after suffering significant financial losses.

The legislative context in Menow is also unique. In the Menow case the court looked to specific liquor laws both for the purpose of determining whether: (i) there was a duty of care on the hotel operator based on common law principles; and (ii) the hotel operator and his employees had breached that duty in the circumstances at issue. The provisions of the liquor law statutes relied upon in Menow are quite specific in dealing with the conduct of the hotel operator in contrast to the vague and general statutory provisions governing the operation of Ontario casinos and other gaming venues. As an example, section 53(3) of The Liquor Licence Act, 1960, relied upon in Menow provided that “no liquor shall be sold or supplied on or at any licensed premises to or for any person who is apparently in an intoxicated condition”. Section 81 of The Liquor Control Act, 1960, was to the same effect. The liquor law statutes also expressly provided for civil remedies for certain breaches by the hotel operator which breaches resulted in loss or damage. In circumstances:

(a) where a person who is apparently in an intoxicated condition continues to be sold liquor and, as a result, commits suicide or meets death by accident, an action under The Fatal Accidents Act lies against the person who sold the liquor; and

50 Courts in New Jersey have found that it is at least incumbent on the casino not to permit an intoxicated patron to gamble. See for example, Greate Bay Hotel & Casino v. Tose 34 F.3d 1227 C.A.3 (N.J.), 1994.
where a person who is in an intoxicated condition continues to be sold liquor, causes injury or damage to the person or property of another, such other person is entitled to recover an amount to compensate him for his injury or damage from the person who sold the liquor.  

In comparing the statutes governing the operation of Ontario gaming venues, it is noteworthy that:

(a) unlike the intoxicated patron, there is no specific reference to problem gamblers in any of the statutes or regulations governing the operation of an Ontario casino or other gaming venue;

(b) the casino operator is not prohibited from permitting problem gamblers entry to casinos or to gamble therein;

(c) the casino operators are not prohibited from serving or permitting apparent problem gamblers to continue to gamble in their establishment; and

(d) there are no express rights of action or other civil remedies provided to problem gamblers or persons affected by their conduct for any breach of any statute governing the operation of gaming venues by the casino operator or his staff.

Rather than providing specific duties, rights and remedies, the legislation concerning gaming venues provides only a vague and undefined duty on Ontario to regulate gambling “in the public interest and in accordance with the principles of honesty, integrity and social responsibility.” In furtherance of that duty, section 15(1)(e) of the *Ontario Lottery and Gaming Corporation Act, 1999*, permits the Lieutenant Governor in Council to make regulations “prohibiting classes of individuals from entering or remaining in a gaming premises during the playing of games of chance in the premises”. No regulations have been passed prohibiting casino operators from permitting entry to known problem gamblers or requiring casino operators to eject the problem gamblers after they have shown themselves to be unable to control their gambling habit.

As stated above, only the Province has the authority to conduct and manage this gambling activity. That it has failed to enact specific regulations to implement its general duty to promote gambling in a socially responsible manner may be relevant to the court’s examination of the legislative context from which a duty of care may arise.

Ontario provides funding for problem gambling research, treatment and education. It will undoubtedly be argued in a problem gambler claim that this funding for problem gambling research, treatment and education may be taken as an implied recognition of some duty owed to problem gamblers on the part of Ontario and the agents operating Ontario’s gaming venues. However this funding may be construed, it is far from clear that the legislation was intended to impose any duty upon casino operators to prohibit entry or service to problem gamblers or to take any other form of affirmative action to limit economic harm to problem gamblers.

The emphasis in *Menow* was on the knowledge of the hotel operator or his employees of the patron and the patron’s condition. It is likely that the law concerning liability for problem gamblers will develop step by step having regard to the knowledge of the operator or his employees of the condition of the specific problem gambler. Absent specific knowledge, however acquired, of the problem gambler’s

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52 *Alcohol and Gaming Regulation and Public Protection Act, 1996*, S.O. 1996, c. 26, s. 3(3).
condition, it is unlikely, given the current state of the law, that Ontario’s courts will make casino operators responsible for losses or damages suffered by the problem gambler.

That Canadian judges will be cautious in extending commercial host liability to other contexts is evidenced by the Supreme Court of Canada’s consideration of commercial host liability and whether it should be extended to the social host. In Childs v. Desormeaux, the social hosts hosted a pot-luck supper and bring your own bottle party. The party was attended by Desormeaux, a person with a history as a heavy drinker. Desormeaux drank to excess at the party and, after an altercation with another guest, left the party in his automobile. Shortly afterwards, Desormeaux’s vehicle crossed the center line of the highway into the path of an oncoming vehicle and collided with it. Childs, a passenger in the other vehicle, was rendered a paraplegic and sued Desormeaux and the social hosts.

In these circumstances the trial judge held that the social hosts had a duty to monitor Desormeaux’ drinking while at the party because of his history of being a heavy drinker. The trial judge declined, however, to impose a duty of care on the social hosts for policy reasons and dismissed the action.

The Court of Appeal for Ontario agreed with the trial judge that the action should be dismissed against the social hosts but, unlike the trial judge, determined that the social host did not on the facts of the case owe a duty of care to users of the road.

In determining that there was not a duty of care the Court of Appeal examined the statutory framework and considered whether the statute showed intention on the part of the legislature that those who breached the statutory duty imposed upon them should be liable to the individuals affected. Writing for the court, Weiler J. stated:

In cases involving the service of alcohol by a commercial establishment, the underlying liquor licence statutes have played a role in the imposition of a duty of care: Jordan House, supra. In other regulatory cases involving pure economic loss, a legislative intent not to impose a private law duty of care has been inferred: Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562 and Cooper v. Hobart, [2001] 3 S.C.R. 457. The existence and nature of any statutory obligations is also relevant to the expectations of the parties, which is another factor in considering whether it is just and fair to impose liability.

Later in her decision, Weiler J. remarked that commercial hosts are closely regulated by statute and have a statutory duty not to serve alcohol to a visibly intoxicated person. To comply with their statutory duty, commercial hosts must monitor the alcohol consumption of their patrons and control the structure of the environment in which alcohol is served. While alcohol consumption is a prevalent feature in the ordinary day to day social interaction between social hosts and their guests, Weiler J. observed there are no corresponding statutory standards against which to judge the imposition of a duty at common law on social hosts.

The Supreme Court of Canada unanimously dismissed Childs’ appeal. The Court held that social hosts of parties where alcohol is served do not owe a duty of care to third parties who may be injured by intoxicated guests. In distinguishing the social host context from the commercial host situation, McLachlin C.J.C. stated for the Court:


…Three differences in the plaintiff-defendant relationship suggest that the possibility of a duty of care on commercial hosts does not automatically translate into a duty of care for social hosts.

[18] First, commercial hosts enjoy an important advantage over social hosts in their capacity to monitor alcohol consumption. As a result, not only is monitoring relatively easy for a commercial host, but it is also expected by the host, patrons and members of the public. ...[N]ot only is monitoring inherently part of the commercial transaction, but [...] servers can generally be expect to possess special knowledge about intoxication.

[19] Second, the sale and consumption of alcohol is strictly regulated by legislatures, and the rules applying to commercial establishments suggest that they operate in a very different context than private-party hosts. This regulation is driven by public expectations and attitudes towards intoxicants, but also serves, in turn, to shape those expectations and attitudes. In Ontario, where these facts occurred, the production, sale and use of alcohol is regulated principally by the regimes established by the Liquor Control Act, R.S.O. 1990, c. L.18, and the Liquor Licence Act, R.S.O. 1990, c. L.19. The latter Act is wide-ranging and regulates how, where, by and to whom alcohol can be sold or supplied, where and by whom it can be consumed and where intoxication is permitted and where it is not.

[20] These regulations impose special responsibilities on those who would profit from the supply of alcohol. This is clear by the very existence of a licensing scheme, but also by special rules governing the service of alcohol and, as noted above, special training that may be required. Clearly, the sale of alcohol to the general public is understood as including attendant responsibilities to reduce the risk associated with that trade.

…

[22] Third, the contractual nature of the relationship between a tavern keeper serving alcohol and a patron consuming it is fundamentally different from the range of different social relationships that can characterize private parties in the non-commercial context. ... Unlike the host of a private party, commercial alcohol servers have an incentive not only to serve many drinks, but to serve too many. Over-consumption is more profitable than responsible consumption. ... This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.55

It may be successfully argued that the commercial gaming context is much more analogous to the commercial host context than the private host situation at issue in Childs. Casinos have a variety of tools with which to monitor the gambling habits and losses of their patrons. They operate in a unique legislative regime which, though not specifically regulating the manner in which games of chance will be delivered, impose a general duty to operate in “the public interest and in accordance with the principles of honesty and integrity.”56 Finally, casinos and problem gamblers enjoy a contractual relationship in which, like the tavern keeper, the casino has a “perverse” incentive to maximize gambling activity and patron losses.

56 Alcohol and Gaming Regulation and Public Protection Act, 1996, supra note 15 at s. 3(3).
That a court will simply extend the duty on the part of commercial providers of alcohol by simple analogy to gambling providers is, nevertheless, unlikely. More probable is that judges will take a conservative approach and determine whether a novel duty is established by reference to the two-part Anns test.\(^{57}\) In so doing, the Court will have to balance competing policy considerations averted to in *Childs v. Desormeaux*: the plaintiff’s personal responsibility for the consequences of voluntary behaviour\(^{58}\) versus the defendant’s obligation to prevent foreseeable harm in an inherently risky commercial enterprise that includes responsibilities to the public at large.\(^{59}\)

**10) RECOVERY OF PURELY ECONOMIC LOSSES**

Even though it is likely that, with the right constellation of facts, a duty of care will be imposed on Ontario and its casinos vis-à-vis a problem gambler that is not negated by public policy concerns, it is less likely that those who suffer financially as a result of the problem gambler’s losses and psychological injury will recover damages. Purely economic claims arise when individuals who have suffered neither personal injury nor property damage assert that another’s negligence has resulted in their financial detriment and, in the absence of contractual or fiduciary rights, seek compensation. As a general proposition, the common law has not been willing to treat recovery for economic loss on the same basis as it does for recovery for physical damages. Where the recovery of purely economic loss has been permitted, it has been on the basis of rules fashioned to meet the concerns of the particular situation.

The major policy concern, which applies in varying degrees to all categories of economic loss claims, is that the claim will open the floodgates to lawsuits by an indeterminate class in respect of indeterminate liability. Economic loss, unlike physical harm, has been dealt with in terms of categories because appropriate criteria for liability must be worked out for each distinct type of case. The Supreme Court of Canada adopted the categories approach to purely economic loss in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*\(^{60}\) In that decision, LaForest J. stated the following:

… the question of recoverability for economic loss must be approached with reference to the unique and distinct policy issues raised in each of these categories. That is because ultimately the issues concerning recovery for economic loss are concerned with determining the proper ambit of the law of tort, an exercise that must take account of the various situations where that question may arise.\(^{61}\)

\(^{57}\) *Anns v. London Borough of Merton*, *supra* note 32 and accompanying text.

\(^{58}\) *Childs v. Desormeaux*, *supra* note 56 at para. 45: “A person who accepts an invitation to attend a private party does not park his autonomy at the door. The guest remains responsible for his or her conduct. Short of active implication in the creation or enhancement of the risk, a host is entitled to respect the autonomy of a guest. The consumption of alcohol, and the assumption of the risks of impaired judgment, is in almost all cases a personal choice and an inherently personal activity. Absent the special considerations that may apply in the commercial context, when such a choice is made by an adult, there is no reason why others should be made to bear its costs.”

\(^{59}\) *Ibid.* at para. 37: “The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: Dunn v. Dominion Atlantic Railway Co. (1920), 60 S.C.R. 310; Jordan House Ltd. v. Menow, [1974] S.C.R. 239; Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (1998), 39 O.R. (3d) 487 (Gen. Div.). In these cases, the defendants offer a service to the general public that includes attendant responsibilities to act with special care to reduce risk. Where a defendant assumes a public role, or benefits from offering a service to the public at large, special duties arise.”


Recovery for economic losses has been recognized in the following category of cases:

(i) reliance on negligence statements;
(ii) negligent performance of services;
(iii) relational economic losses; and
(iv) economic losses caused by defective products.

It is difficult to see where a claim for recovery of purely economic losses by the problem gambler or his dependents against the allegedly negligent casino operator would fit within this framework.

Such a claim clearly does not fall within the category of cases dealing with economic losses caused by defective product, unless the loss is caused by some defective gaming device or machine. It also does not fall within the negligent statement category of cases unless the problem gambler can somehow argue that he was misled by casino advertisement into believing that he could gamble without risk of significant financial loss.

In a relational economic losses claim, such as that by an employer or a family member against a casino, it must be argued that the injury to the problem gambler will detrimentally affect the financial situation of the others and that their losses were reasonably foreseeable. However, as Lewis Klar cautions, “one may confidently state that as a general rule a person cannot claim recovery for relational economic losses based solely on a test of reasonable foreseeability”. Recovery for purely economic losses has been permitted only when the court’s concerns for indeterminate liability have been allayed. It is difficult to avoid the specter of indeterminate liability in any claim advanced by persons who have suffered a loss because of the problem gambler’s losses. The number of potential claimants may be as varied as the number of problem gamblers. Generally, the casino operator will not know the source of the problem gambler’s funds and/or the persons who would benefit from a more appropriate use of those funds.

The category of negligent performance of services may be considered as a possible basis for the problem gambler claim. It has been described as a wide and rather ambiguous category of cases similar to negligent statement cases where a duty can be imposed on an individual to take reasonable care to perform gratuitous services. The crux of this duty has been described as the defendant’s voluntary undertaking to carefully perform a service for the plaintiff’s benefit coupled with the plaintiff’s detrimental reliance on this undertaking. In this situation, the fact that the plaintiff’s loss is purely economic is not a bar to recovery once the necessary relationship has been found to exist.

How does this description fit the relationship between the casino operators and the problem gambler? The only gratuitous service that comes to mind is arguably the voluntary commitment to exclude the self-identified problem gambler. But there are significant difficulties even with this self-excluder claim. The law traditionally has stressed the unenforceability of gratuitous undertakings. The crux of this duty has been described as the defendant’s voluntary undertaking to carefully perform a service for the plaintiff’s benefit coupled with the plaintiff’s detrimental reliance on this undertaking. In this situation, the fact that the plaintiff’s loss is purely economic is not a bar to recovery once the necessary relationship has been found to exist.

63 Klar, *ibid.* at 235.
promise to render a service by the casino, voluntary or otherwise, coupled with adequate communication of the casino’s intentions to render such services and detrimental reliance by the problem gambler on that promise.64

In summary, recovery by a problem gambler for purely economic loss, or recovery by third parties for consequential loss, would require significant innovations in this area of the law.

11) CONCLUSION

As stated at the beginning of this paper, there are no ready answers to the questions of whether Ontario and its gaming venues may be held responsible, and in what circumstances they may likely be held responsible, for the financial and other harm suffered by problem gamblers. The policy arguments on both sides of this vexing social problem are strong.

In this paper the authors have examined the legal framework within which these issues will be decided by the court, both by reference to the statutory framework within which Ontario casinos operate and in light of existing jurisprudence, particularly vis-à-vis commercial hosts.

On balance, it is the authors’ view 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 knew or ought reasonably to have known based on the existence of a Self-Exclusion Request or other evidence, that the gambler was a problem gambler. Whether a breach of that duty gives rise to liability for a pure economic loss claim is more problematic.

Given the current uncertain state of the law, the outcome of any problem gambler’s claim is by no means a safe bet, but it is at least certain that an Ontario court will permit such a claim to proceed to trial. To use the words of the Supreme Court of Canada, “only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our … society.”65


Appendix A. OLG Self-Exclusion Form

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). Counseling 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 services is an important step in changing your life for the better.

SELF-EXCLUSION

What is self-exclusion?

Another step that 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 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 Corporation ("OLGC") gaming facility and you agree to release OLGC and its gaming facilities from any liability should you decide to re-enter an OLGC gaming facility and gamble. After signing the Request, OLGC 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 OLGC 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 our gaming facilities – or you may call in advance and make an appointment. Self-exclusion must be done in person at any OLGC 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 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 OLGc gaming sites including Casino Rama, Casino Niagara, Niagara Fallsview Casino Resort, Casino Windsor, Great Blue Heron Charity Casino and OLGc’s charity casinos and slot machine 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 the form at this meeting before returning to a gaming site to play. OLGc does not promote reinstatement.

Know Your Limit, play within it!
Ontario Problem Gambling Helpline 1-888-230-3505

Jan. 25/05
Request to be Placed on the Self-Exclusion List and Release

I request to be placed on the Ontario Lottery and Gaming Corporation's ("OLGC") list of self-excluded persons (the "List"). I acknowledge that it is solely my responsibility to refrain from visiting an OLGC gaming facility and gambling in the future. I also acknowledge receipt of the toll-free phone number for the Ontario Problem Gambling Hotline, and that it is my responsibility and decision whether or not to seek treatment or counselling.

I understand that, as a result of being placed on the List, OLGC and the commercial casinos will, within a reasonable time period, remove me from their mailing lists. I understand, however, that I may receive marketing materials to the extent mailings have already been initiated and cannot be stopped. I understand that I will become ineligible to participate in any players' programs, and promotional offers. I confirm that I have either returned all players' cards in my possession or undertake to destroy them.

I acknowledge and agree that OLGC, the private operators of OLGC gaming facilities, and their respective agents and employees, have no responsibility or obligation to keep or prevent me from entering an OLGC gaming facility, to remove me should I enter, or to stop me from gambling.

I confirm that this form constitutes written notice under the Trespass to Property Act that my entry onto an OLGC gaming facility is not permitted, and that I may be arrested and charged for trespass without further notice or warning should I enter an Ontario gaming facility.

In consideration for being placed on the List, I agree to release and not to sue the Province of Ontario, the OLGC, all private operators of OLGC gaming facilities and their respective agents and employees, from and for any claims or causes of action that I have or may have arising out of any act or omission relating to the processing, implementation or enforcement of this request to be placed on the List, including the forwarding of the contents of this request to any OLGC gaming facility, private operator of such facilities, or their agents or employees, or for any financial loss, physical injury or emotional distress or any breach of confidentiality that may occur as a result.

I have read this Request to be Placed on the Self-Exclusion List and Release and understand all of its terms. I sign it voluntarily and with full knowledge of its consequences and significance.

I have signed this Request to be Placed on the Self-Exclusion List and Release at ______________________ on the _______ day of ______________, 20____.

First Name ___________________________ Last Name ___________________________
Street _______________________________ City/Town ___________________________
Province/State _______________________ Postal Code _________________________
Form of Identification __________________ I.D. Number _________________________
Date of Birth __________________________ Signature __________________________

Name of Issuing Gaming Establishment _______________________________________
Employee Name ______________________ Employee Number ______________________

Personal information contained on this form is collected and retained pursuant to the Ontario Lottery and Gaming Corporation Act and will be used for the purpose of responding to your request. Questions about this collection should be directed to the Freedom of Information and Privacy Coordinator at the OLGC.

For information about problem gambling, and/or referral to treatment resources in Ontario, contact: ONTARIO PROBLEM GAMBLING HELP LINE 1-888-236-3505

Jan./05.fmm