



BETS, BOOZE, AND BAD HABITS: TRENDS IN TORT LAW FOR GAMING OPERATORS

February 2011

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I. INTRODUCTION

Casinos face a considerable number of risks that expose them to liability through their everyday operation. Some of these risks are familiar to most business operations, such as obligations imposed by the *Occupiers Liability Act*, with some particular characteristics. Casinos however also face risks more particular to casino operations, arising from the service of alcohol, and allegedly the addictive nature of gaming.

This paper will outline some of the particular characteristics of claims made against Casinos under the *Occupiers Liability Act*, and will discuss issues arising from the service of alcohol to patrons. It will also outline the new emerging trend of claims relating to alleged gambling addiction, and the origin of those claims from other countries. The goal of this paper is also to provide practical advice to casino operators to minimize the risks faced by their operations.

II. OCCUPIERS LIABILITY ACT CLAIMS

In British Columbia, anyone who occupies a property must take care that the property will be reasonably safe to visitors. This duty extends to the condition of the property, and to the activities on the property. Casinos face risks in meeting this duty, generated by the nature of their operations.

a. Visual distractions

Occupiers of a property must provide adequate lighting, so that the property can be safely used by visitors. There are two separate lighting issues to be considered in the context of a casino – whether the lighting creates a danger in and of itself, or whether the lighting prevents or distracts a visitor from noticing a hazard that would otherwise be apparent. Casinos often create visual effects that may distract visitors and potentially create a hazardous environment by increasing the risk of trips or falls. For example, the eye-catching light of a stage show, or the flashing lights projected from a certain gaming devices such as slot machines, may in fact distract patrons from safely walking on the premises.¹

¹ The courts have considered visual distractions in a variety of other contexts. In *Lamarche v. Grebenjak* 2010 ONSC 2316, a motorist struck a pedestrian. The Plaintiff claimed against the motorist, and claimed against a nearby



Of course, the standard applied to casinos is the same as all occupiers: a standard of reasonableness. Casinos should mitigate this risk by ensuring that there is adequate ambient lighting throughout the casino property. This is of specific importance in slot machine areas where lighting is accompanied by distracting noise, and other areas where the guest's attention will be drawn away from the ground, such as in sports books where betting lines and sports events are displayed on television monitors above eye-level.

b. High traffic business

As discussed above, all occupiers of properties owe a duty to keep the property reasonably safe to visitors to the property. In British Columbia, this means that some occupiers have a heightened duty to monitor the condition of the premises due to the high volume of use of the property by the public. Properties with high usage or traffic, such as supermarkets and gas stations, have often been held to a higher standard than low traffic properties, such as residential rental buildings.

Additionally, high traffic will create more risks on the property. In the context of a casino, this can be a carpet tearing which may create a trip hazard, or a spilt drink that becomes a slip hazard. The effect is that the visitor to the casino will be subjected to additional hazards created through the use of the property, not just the static condition of the property.

The owner of the casino will be judged to a higher standard with respect to the creation of the hazard and the length of time which may be taken to remove a hazard. Given that nearly all parts of a gaming establishment property are monitored through live electronic surveillance, courts will be reluctant to give gaming establishments any leeway time to address a hazard, such as spilled drink.

Casinos therefore should establish protocols for immediate cleanup of all hazards created on a property, and make sure that staff persons are properly trained to act quickly. Some specifics include:

- Clear lines of communication between all departments and the maintenance department;

drive-in movie theatre for creating a visual distraction to passing motorists by angling the theatre screen towards the roadway. The claim was dismissed, but on the basis that there was no specific evidence that the screen actually distracted the specific motorist who struck the Plaintiff. In *Vann Niagara Ltd. v. Oakville* [2002] OJ No 2323, the Court of Appeal accepted that fewer billboards located near highways promotes road safety, as they are visual distractions to motorists.



- Maintenance personnel being available at all hours that the establishment is open;
- A protocol that if a hazard, such as a spilled drink, is located by any staff person, a staff person must stand near or even over the hazard to prevent guests from coming in contact with it;

This is a non-exhaustive list and should be seen as starting suggestions rather than as a guide.

c. Service of alcohol

For the past 40 years, the courts have recognized that companies engaged in the commercial sale of alcohol have a special relationship with their customers that gives rise to a duty of care to the customer, and to any third party that the customer may encounter, to keep them safe from harm that could result from the customer's intoxication.

Many casinos in British Columbia have obtained liquor licences to serve alcohol at gaming tables and/or in restaurants located within the casino property. In addition to the normal risks associated with commercial service of alcohol, casino's size and diversity of casino operations, put them at particular risk, for several reasons:

- Casino facilities can be occupied by exponentially more persons than an ordinary bar or restaurant.
- Casinos often offer multiple points of sale for alcohol throughout the property.
- Casinos often offer sale of alcohol from different sections of the Casino's business such as the gaming floor and restaurants, which may have different standards for the monitoring of consumption.
- Casinos usually do not check all persons entering on the property specifically for signs of intoxication.

For example, a patron might start his or her evening playing a table game and consume 3 bottles of beer in an hour, served by a waitress walking a section of the gaming floor. That patron may then have dinner at the casino restaurant, and consume 2 glasses of wine in an hour. The patron may then return to gaming in another area of the casino, and be served more drinks by a third employee. The patron may then decide to drive home. Given the multiple points of service, identifying this patron before he or she has an opportunity to drive home as overly intoxicated may be nearly impossible.



The effect of the above will likely increase claims for injuries suffered by patrons who leave the Casino in a state of intoxication and are subsequently injured or who injure others. This risk can be minimized by the following:

- Making sure that all persons involved in the service of alcohol have taken “Serving it Right” training.
- All security guards and other employees who deal directly with visitors to the casino obtain the “Serving it Right” training.
- Management should hold regular staff meetings to keep all staff up to date with new issues regarding over-service of alcohol, such as the changes in the legal driving limits for intoxication.
- Staff serving alcohol could be required to ask patrons who consume a certain number of drinks how they are getting home.
- Casinos should have specific procedures for staff to follow when a patron insists on driving home while intoxicated, such as always calling the police.

Effective monitoring and training is key to reducing the likelihood of claims being made by third parties who are injured by intoxicated patrons, or by the intoxicated patrons themselves if they are injured after leaving the casino intoxicated. Staff should communicate with each other about the existence of possibly intoxicated customers, given the potential for such customers to move around within the casino.

d. Public Attitude Towards Gaming

Based on discussions with Industry Managers, there is a common conception in the public mind that gaming establishments “deserve” to be sued. This likely arises from the public perception that gaming establishments reap enormous profit through their operations, and have a somewhat disreputable historical image.

Unfortunately this is a public relations issue and cannot be directly addressed through risk-management steps. However, efforts should be made at the customer service level to be responsive and sympathetic to potential plaintiffs who report claims. Casinos that assist potential plaintiffs with their recovery from an injury at the casino, and treat the potential plaintiff’s fairly in resolving their claims before litigation, are less likely to be sued than casinos who do not.

e. Video surveillance and Incident Reports

The British Columbia Lottery Corporation requires casinos to maintain video footage of any “incident” in a casino. Casino employees are also required to complete incident



reports following any incident, which are then typically centrally logged after being reviewed by a supervisor.

Video surveillance is an excellent tool for the early analysis of claims made by patrons. Surveillance staff should make every effort to capture as much footage of an incident as possible. Surveillance staff should also capture as much footage as possible of the injured guest before and after an incident occurs, as this footage is often as useful as the footage of the incident itself. For example, if a patron slips and falls in a casino but then gets up, laughs off the fall, and spends the next several hours gambling, it will be more difficult for them to argue later that they were seriously injured.

Incident reports are useful, because they capture information not available on video footage – details of conversations, the state of intoxication of a guest, and even a description of the footwear worn by a guest who has slipped and fallen. Casino employees completing incident reports should take the time to be as detailed as possible, and include specific details which relate to the nature of the incident. Casino management can educate employees to use the incident reports effectively by having checklists for staff persons for typical types of incidents, such as forceable ejections or trip and fall injuries.

Casinos should note that all video surveillance and incident reports, unless created for the specific purpose of defending a lawsuit, will have to be produced in any lawsuit that arises from an incident. Casino employees therefore should write reports carefully, knowing that admissions in an incident report (for example, in the case of a slip and fall incident, “the floor was wet and slippery”) may be used against the Casino. Further, employees should be trained to not make assumptions about an incident, or make any commentary – the reports should be objective and confined to the facts. Supervisors should be mindful of this issue when reviewing incident reports before logging the report to ensure that they accurately reflect the employee’s involvement.

f. On-site First Aid:

Casinos have a second advantage in addressing personal injury claims – on-site first aid. Casinos typically have first aid attendants on site at all times to attend to any visitor who requires immediate medical attention while at the casino. The first aid attendants will typically complete a first-aid report, including symptoms, treatment, and objective signs of injury, after treating the visitor.

This report and any additional commentary from the first aid attendant is an excellent source of information regarding a potential plaintiff’s injury as it creates an on-the-spot record of the actual injuries suffered. First aid attendants should take great care to note



their observations as accurately as possible as their report will likely become a document in a lawsuit, or help guide an informal resolution of a claim before the claim becomes a law suit.

II. GAMBLING ADDICTION CLAIMS

Claims against casinos relating to “Gambling Addictions” have begun emerging in recent years. These cases typically arise when a casino patron signs up for a voluntary exclusion program², and then the casino permits the patron to return to the casino and gamble, despite the self-exclusion.

These claims have recently obtained media attention in Canada with the commencement of a claim in Ontario against the Falls View Casino in Niagara Falls, cited as *Isaacs v. Ontario Lottery and Gaming Corporation and Falls Management Company* (Hamilton Registry, Statement of Claim filed January 25, 2008).

Most recently, the first decision in Canada on gambling addiction claims has just been released, cited as *Burrell v. Metropolitan Entertainment Group*, 2010 NSSC 476. This decision confirms that there is no general duty of care owed by casinos to problem gamblers.

Such claims are not novel outside of Canada. Claims against casinos for supporting a gambling addiction have arisen in the United Kingdom and Australia, and will likely guide the development of the law in Canada.

a. *Australia*

In *Reynolds v. Katoomba*, [2001] NSWCA 234, the plaintiff belonged to the defendant’s gambling club. In the law suit, the plaintiff alleged that he was a problem gambler, and that the gambling club owed a duty to advise the plaintiff to resign his membership, to warn him about his lack of care, and to refuse to cash cheques or make cash advances to him for gambling purposes. The claim was dismissed at trial. On appeal, the Court of Appeal noted that:

Even with knowledge of problem gambling, how is the club to know, when asked to cash a cheque, whether the anticipated gambling is the unwanted but compulsive craving of a

² A self-exclusion program is a program where a patron, who believes that they have a problem controlling their gambling, can request that a casino bar them from the casino premises so as to prevent them from gambling in the future.



problem gambler or the choice of a sometime problem gambler then in control of his indulgence?

Other judges on the appeal further noted that gambling losses are not a form of loss that the courts recognize nor is protection from gambling losses a right that the courts should enforce.

More recently in *Harry Kakavas v. Crown Ltd* [2007] VSC 526, the court dismissed the plaintiff's claim relating to his financial losses caused by an apparent gambling addiction, but noted that a casino operator may commit a breach of duty of care if it knowingly exploited a problem gambler.

b. United Kingdom

The most recent and perhaps most in-depth analysis of this issue comes from the United Kingdom in the decision of *Calvert v. William Hill Credit Ltd.* [2008] EWCA Civ 1427. Mr. Calvert, a 25 year old greyhound trainer, sued William Hill Credit Ltd., claiming some £1.7 million pounds in gambling losses. William Hill offered a call centre betting service by which a patron could phone in bets on sporting events. Mr. Calvert repeatedly opened telephone gambling accounts, then closed them within a few months, typically for the reason that "...it's just too easy to gamble...". Mr. Calvert's betting patterns were very significant – often his bets exceeded £100,000 pounds. Customer service and risk managers were notified of these betting patterns but they were not told of Mr. Calvert's repeated opening and closing of accounts.

The Court found that William Hill had breached the standard of care owed to Mr. Calvert:

175 ...The claimant presented himself to John [an employee of William Hill] as a problem gambler, asked for help and was offered it in the form of a six months' self-exclusion from gambling which he accepted. John then told the claimant that his account had been closed, and that for six months it would not be reopened, nor would he be permitted to gamble on the telephone with William Hill. The exchange was in all respects tantamount to a contract, save for the absence of consideration. In particular, the claimant was given to understand that he need do nothing more to obtain that self-excluded status. Because of John's omission to process the claimant's self-exclusion, the claimant was not required to sign a document clearly recording William Hill's disclaimer of legal liability, or even his own obligation to comply with self-exclusion by abstinence. In summary therefore, the claimant presented himself as a problem gambler in need of help, asked for specific help, and was assured that he would be given it.



176 *In my judgment those facts disclose a sufficient voluntary assumption of responsibility by William Hill to exclude the claimant from telephone gambling with the company for six months to give rise to a duty to take care to implement that exclusion...In short, faced with a request for help from a person of some (albeit uncertain) vulnerability, William Hill chose to undertake to do that which was requested, without any disclaimer of legal responsibility.*

The Court was not willing to recognize a widespread duty in every case where the casinos fail to catch self-excluded patrons:

184...*I can envisage no floodgates being opened by recognition that William Hill assumed responsibility to the claimant in the particular circumstances of the 5th June conversation. It arose from a combination of John's assurance to the claimant that he need do nothing more to exclude himself, coupled with John's own failure to process the claimant's request in any way. It emerged only in the course of cross-examination and thereafter from documents belatedly disclosed that John has been disciplined for what he did and that, but for the fact that he was under considerable pressure of work at the time, his misconduct would have been regarded as very serious, and therefore unusual. In the ordinary run of cases, I have no reason to suppose that problem gamblers would either be promised self-exclusion in the course of an initial conversation, or given it in due course without a clear reliance upon William Hill's standard disclaimer. Since the specimen self-exclusion agreement promulgated by the ABB also contains a disclaimer, I see no reason why the recognition of a duty of care in the special circumstances of this case should open floodgates in relation to the affairs of other bookmakers"*

However the court dismissed the plaintiff's claim on the basis that the plaintiff had not proven causation against William Hill:

196...*It would in my opinion fly in the face of common sense and be a travesty of justice if a problem gambler were able to attribute liability for his financial ruin to a particular bookmaker with whom he had made the relevant losses due to their failure to exclude him at his request, if he would, had he been excluded by that bookmaker, probably have ruined himself by betting with one or more of that bookmaker's competitors...*

197 *It follows that in my judgment it is essential for the court to form a view about what would have happened to the claimant's gambling career if he had been excluded from telephone betting with William Hill. If the conclusion is that he would still have suffered financial and social ruin and a similar aggravation of his gambling disorder by betting with others, accompanied by more intensified gambling at William Hill's betting offices, it seems to me that as a matter of common sense the claim must fail on causation grounds. William Hill's negligence may have been a sine qua non for his particular gambling losses, but would not have been the effective cause of his ruin.*



In other words, if William Hill had effectively self-excluded the plaintiff, he would have simply called up another telephone betting operator and started a new account with that company, and suffered the same loss.

c. United States

There have been cases relating to gambling addiction in the United States for over 30 years. However the success of these claims have been mixed, and often has turned on state-specific legislation.

In *Wynn v. Monterey Club*, 111 Cal. App. 3d 789 (1980), the 2nd Appellate District, the plaintiff was the husband of a compulsive gambler who cashed numerous cheques at the defendant's casinos. The plaintiff discovered his wife's gambling activities and had the defendants agree to not cash cheques for the plaintiff's wife. The Defendant upheld the agreement for approximately one year, and then suddenly stopped following the agreement. The plaintiff's wife cashed cheques and lost an additional \$30,000 at the defendant's property, and the plaintiff's marriage to his wife fell apart.

The plaintiff claimed in breach of contract against the defendants, arguing that the defendants had entered into a contract in which they agreed to bar the Plaintiff's wife from their casinos, and to refuse to cash her cheques. The action was dismissed on a summary trial hearing but was reversed by the Appellate Court and referred back to trial division for a new trial. The Appellate Court did not comment directly on whether the contract was valid, but did state that it was a triable issue and could not be summarily dismissed.

In *Merrill v. Trump Indiana*, 320 F. 3d 729 (USCA 7th cir., 2003), the plaintiff claimed against Trump Casinos for failing to prevent him from gambling despite having a gambling addiction, which in turn allegedly caused the Plaintiff to become a bank robber. The Appellate Court noted that Indiana has very specific regulatory penalties that could be applied to casinos, and these penalties typically regulate compulsive gambling complaints. However:

"...Merrill also argues that, even in the absence of a statutory duty, Trump owed him a duty of care under common law. We can find no Indiana case addressing the extent of the duty owed by casinos to their patrons. Indeed, it appears that no court has addressed the specific issue whether casinos can be sued in tort when they fail to evict a gambler who requests his own exclusion..."

The Appellate Court upheld the trial division's dismissal of the Plaintiff's claim:



The closest analogy to Merrill's situation is that of a tavern's liability to exercise reasonable care to protect its patrons. In Indiana, a tavern proprietor serving alcohol can be held liable, under certain conditions, if an intoxicated patron injures another patron or a third party...Essentially, Merrill thinks that the casino should be held responsible for the destructive effects of his 1998 relapse into gambling. But Indiana law does not protect a drunk driver from the effects of his own conduct, and we assume that the Indiana Supreme Court would take a similar approach with compulsive gamblers."

Had this matter arisen in another state that does allow drunk drivers to make claims against taverns for their own injuries, it is possible that the Appellate Court would have allowed Mr. Merrill's claim.

In *Stulajter v. Harrah's Indiana*, 808 N.E. 2nd 746 (2004), the plaintiff sued a casino that permitted him to gamble and suffer significant losses after he had placed himself on the casino's self-exclusion list. The Appellate Court determined that Mr. Stulajter did not have a private cause of action against a casino for his gambling losses, given that Indiana had an extensive regulatory scheme, including a discipline and investigations commission:

Stulajter claims that the statutes give rise to a private cause of action in this case because the harm is to an individual and not the public at large. We disagree with Stulajter's assertion that a private individual has the right to bring a cause of action for the failure to comply with the self-exclusion list requirement because the harm is a private injury instead of a general public injury...The duty to determine the requirements of and enforce the voluntary exclusion program rests with the Commission...If the legislature intended to create a right to a private cause of action under the Commission rules for riverboat gambling, it could have included such a provision. Because it did not do so, we conclude that Stulajter does not have the right to bring a private cause of action based on a violation of the self-exclusion program rules. If Harrah's is in violation of any of the stated statutory provisions, it must answer to the Commission, not a private citizen claiming harm from the alleged violation.

The more recent case of *Caesars Riverboat v. Kephart*, 930 N.E. 2d 117 (2009) summarizes and considers the cases discussed above and dismissed Kephart's claim. In *Kephart*, Caesars sued Kephart for failing to provide funds to cover cheques written while gambling at Caesars' casino. Kephart counter-claimed against Caesars, alleging that Caesars took advantage of her pathological gambling condition and unjustly enriched itself. The trial judge dismissed the counter-claim, relying on the cases above. The Appellate Court upheld this decision, noting:

The relationship between Kephart and Caesar's is not remote. Under Heck, Sell and Goldsberry, the harm is quite foreseeable, indeed predictable. However, the bilateral foreseeability of the harm associated with gambling does not support the establishment of a common law duty on the part of Caesar's. The small opportunity to win and the substantial likelihood of losing is implicit in the act of gambling and is reasonably and equally foreseeable to the casino and to the gambler alike...Moreover, marketing by casino operators to compulsive gamblers is not reckless conduct.



Most importantly, public policy does not support the imposition of a unilateral duty on casinos to protect compulsive gamblers from the casinos' marketing activities and hosting. The General Assembly has made the public policy decision to legalize gambling and has set up a statutory and regulatory framework to govern how casinos do business in Indiana.

Even if we were to assume that, under the facts presented in Kephart's counterclaim, Caesar's does indeed owe a duty to compulsive gamblers beyond that which is owed to any other business invitee, Kephart's own behavior tips the balance of the duty factors. Despite knowledge of her proclivity towards compulsive gambling, Kephart took no action to cut off her ties with casinos. Additionally, Kephart only decided to seek treatment after losing a large amount of money that she could not pay back. While Caesar's actions in allowing her to write six checks totaling \$125,000 are extremely concerning and should be examined by the Commission under Indiana Code section 4-33-4-2(3), Kephart has a responsibility to protect herself from her own proclivities and not rely on a casino to bear sole responsibility for her actions.

d. Canada

Recently, Canadian courts have now addressed gambling addiction claims (*Burrell v. Metropolitan Entertainment Group*, 2010 NSSC 476). In *Burrell*, the Plaintiff alleged that he gambled at the Defendant's casino from 1995 to 2004, and suffered from a gambling addiction. He attended constantly, was well-known to casino employees, and occasionally spent 48 hour stretches at the casino. He was provided small "perks" by the casino and was allowed to withdraw large amounts of money from ATM machines located at the casino. He suffered significant losses and was unable to make his mortgage payments, ultimately losing his house. In 2004, he notified the casino of his gambling addiction, and on at least one occasion following giving notice, was asked to leave the casino.

The court first addressed the Plaintiff's assertion that there was a duty owed by the casino to the Plaintiff at common law:

[15] My conclusion is that the law does not support the existence of a broad duty of care to problem gamblers, applying the test from *Anns v. Merton*, [1978] A.C. 728, *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537, and *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 (CanLII), [2001] 3 S.C.R. 562, decisions and the other cases referenced. The requirements of proximity and fairness necessary to support a common law duty upon casino operators to exercise the type of care the Plaintiff contends should be afforded to problem gamblers are not present. The pleadings do not indicate that the Defendants did not respond to a self exclusion by Mr. Burrell in a way which would give rise to a duty of care. The revised Answer to the Demand for Particulars, the last component of the Plaintiff's pleading, indicates that when Mr. Burrell indicated he had a problem, he was given notice to stay away from the casino and only had short access on one occasion thereafter. Similarly, the sorts of unconscionable activity or inducements to attend which were identified in other cases as creating exceptional circumstances giving rise to a common law duty of care are not suggested by the pleadings to exist in this case.



[16] *I have concluded that the Plaintiff's claim does not disclose a common law duty of care and that Mr. Burrell's claim is not supportable on that basis.*

In summary, the common law does not support the establishment of a broad duty of care owed by casinos to problem gamblers. A duty may arise if the casino's conduct was unconscionable, but no evidence of that kind was introduced by the Plaintiff in this case.

The court continued to address the Plaintiff's claim within the context of the regulatory and statutory framework:

[20] *The purpose of the Gaming Control Act, as set out in section 2, is publicly oriented. No duty to the Plaintiff different from the general duty to the public as a whole is established by the Act. I reject the Plaintiff's position that a statute should be interpreted to create a private duty of care unless it is expressly precluded. Statutes are prima facie directed to the public good, and absent specific imposition of a private duty of care should not ordinarily be construed as creating that type of relationship. The activities alleged by the Plaintiff do not constitute any failure by the Defendants to execute statutory obligations. The Defendants were exercising legislatively-delegated discretion. The Plaintiff's claim based upon regulatory negligence does not support a cause of action and is clearly unsustainable.*

[21] *...the Plaintiff's claim based on negligent promotion is unsustainable. The Province's decision to allow and regulate gambling in Nova Scotia was a policy decision, which did not give rise to private or individual liability. The duty asserted by the Plaintiff does not fall within the category of cases in which proximity has been recognized, nor where the relationship between the parties warrants extension in the interest of fairness and justice. The claim does not disclose a case of action based upon breach of fiduciary duty*

Therefore, the *Burrell* decision held that there was no duty of care, absent exceptional circumstances, by way of the common law, regulatory requirements, or existing statutory framework.

e. Discussion

To date, no Plaintiff has succeeded in recovering for losses suffered due to being addicted to gambling in Canada. However, all future cases will be decided on their individual facts. Indeed, courts in other countries have found, in certain cases, a duty of care does exist between the Casino and the problem gambler.



While the first Canadian case on this subject has found that no general duty of care exists between Casinos and gamblers, the court left open the possibility of finding a duty of care in “exceptional circumstances”. For example, an “exceptional circumstance” may include the failure of a casino to comply with a request from a problem gambler to be placed on a self-exclusion list.

In light of the *Burrell* case, I recommend Casinos establish comprehensive systems for enforcing self-exclusion requests to ensure that staff persons are adequately trained in identifying and removing self excluded patrons. Casino’s marketing departments should also be informed of any problem gamblers who are self excluded so that such gamblers are not send promotional materials. Anyone who has been self-excluded should be automatically removed from any marketing list. While courts in the United States did not find that marketing to compulsive gamblers was reckless, the courts in the United Kingdom have a differing opinion and have found marketing to compulsive gamblers “reckless”. This issue has not yet been decided in Canada.

III. ALCOHOL-RELATED GAMING LOSSES

A unique trend of cases has appeared, particularly in the United States, where patrons allege that a casino allowed a patron to become overly intoxicated while gaming, and as a result the patron incurred excessive losses. In these cases plaintiffs have alleged that their intoxication clouded their judgment, allowing them to lose considerable sums of money that, had they been sober, they would not have lost (presumably because they would have had the common sense to stop playing after losing a certain amount).

In *Hakimoglu v. Trump Taj Mahal Associates et al.*, 70 F.3d 291; 1995 App., the Plaintiff alleged that the casino served him free alcohol, enticed him into gambling frequently with free hotel rooms and transportation, and freely granted him loans to support his excessive gambling. The plaintiff further alleged that the casino allowed him to become visibly intoxicated while gambling, and while visibly intoxicated he was encouraged by casino staff to continue gambling. In the result, he suffered significant gaming losses. The casino counter-claimed to enforce the gambling loans it had made to the plaintiff.

The Court of Appeal upheld the lower court decision dismissing the plaintiff’s claim:

...[W]e are also influenced by the difficult problems of proof and causation that would result from the recognition of claims such as those involved here. As the district court judge in this case aptly put it:

...casino gambling losses could present almost metaphysical problems of proximate causation, since sober gamblers can play well yet lose big, intoxicated



gamblers can still win big, and...“the house will win and the gamblers will lose” anyway in the typical transition.

However the court added:

Casinos, perhaps the ultimate for-profit institution, make their money from patrons’ losses. Gambling losses are the casino’s business. The casino and the gambler, therefore, are linked in an immediate business relationship much like that from which dram shop liability (liquor liability) sprang – the tavern and the patron....Like the tavern owner, the casino’s control over the environment into which the patron places himself, and its ability to open or close the alcohol spigot, imposes on the casino some concomitant responsibility toward that patron, just as the tavern owner must make sure that drinking does not cause her patron to hurt himself or others, the casino should ensure that its alcohol service does not lead its patron to hurt himself through excessive gambling.

The court added that unlike ordinary commercial providers of alcohol, “...Casinos, on the other hand, can plainly foresee large and unacceptable losses from patrons that they help get drunk.” This comment was made in additional reasons not accepted by the majority of the court, who dismissed the claim, but may be followed in future decisions by other courts.

The court in *GNOC Corp. v. Aboud*, 715 F. Supp. 644; 1989 US Dist. drew a similar conclusion to the case above. GNOC sued to recover \$28,000 in unpaid balances on Aboud’s line of credit with GNOC. Aboud counter-claimed for over \$250,000, claiming that he was encouraged or possibly required to consume alcoholic beverages and to gamble several hours every day to maintain his privileges (free rooms, meals, etc.) at the Golden Nugget (a casino owned by GNOC). GNOC also provided doctors to Aboud when he fell ill; Aboud alleged that the narcotics prescribed by those doctors further impaired his judgment.

GNOC applied for summary judgment of the counter-claim. On considering the pleadings, the court found that:

...a casino has a duty to refrain from knowingly permitting an invitee to gamble where that patron is obviously and visibly intoxicated and/or under the influence of a narcotic substance. Here there are allegations of patent and overt inebriety coupled with the consumption of a powerful narcotic medication prescribed by physicians summoned by and paid for by the casino itself. While under the influence of drugs or alcohol, one suffers a deficit, to varying degrees, of cognitive faculties such as the power to reason sensibly, to appreciate the danger of activities engaged in, and/or to exercise sound judgment.



The court went on to find that a duty of care did exist between GNOC and the plaintiff, and that the harm sustained by the plaintiff was reasonably foreseeable. GNOC's application to dismiss the claim was dismissed, and the action was referred to a jury trial on the questions of whether there was a breach of a duty of care, and whether the breach was the cause of the plaintiff's loss.

While the author is not aware of such a case in Canada, no casino would want to be the "test case" for Canadian law.

IV. SUMMARY

Casinos are exposed to a wide variety of risks that give rise to claims, given that they are generally high-volume entertainment businesses which serve alcohol. Casinos will also have to contend with the rising trend of gambling addiction claims. Although the claims being made in Canada are novel within Canada, these claims are not novel elsewhere and will likely continue to arise in the future.

Casinos also have certain difficulties and particular characteristics that may give rise to a variety of claims made pursuant to the *Occupiers Liability Act*. Again, the defence of these claims can be strengthened by consistent preparation of incident reports and proper maintenance of video footage.

Problem gambling claims can be avoided through vigilant observation of policies regarding self exclusion and by training staff to intervene and remove previously identified problem gamblers from Casinos. Claims made for excessive gambling losses by intoxicated patrons can also be minimized by properly training staff persons to identify intoxicated gamblers, and by implementing procedures to remove intoxicated patrons from casinos.

Of particular concern in the foreseeable future are claims made for excessive gambling losses while a patron is intoxicated. These claims can arise out of simple errors in supervision, failing to identify an intoxicated patron, or difficulty monitoring a patron moving between different areas of a casino.

Further, while the potential duty of care owed by Casinos to problem gamblers to prevent losses arises once the problem gambler has been self-excluded – i.e. formally identified as a problem gambler – the duty of care to an intoxicated patron arise the instant that they become intoxicated and continue to gamble.

With proper policies, training, and supervision, many of these claims can be avoided or,



at a minimum, their impact on the Casino can be minimized. This will result in fewer claims against Casinos, and fewer customers leaving Casinos with their minds turned to commencing a law suit.