Duty of Care to Victims of Problem Gamblers Not "Hopeless"

June 20, 2016

Paton Estate v. Ontario Lottery and Gaming Corporation, 2016 ONCA 458

On June 10, 2016, the Court of Appeal released its decision in *Paton Estate v. Ontario Lottery and Gaming Corporation*. The majority of the Court of Appeal refused to close the door on the possibility that casinos owe a duty of care to victims of "problem gamblers". The majority of the Court acknowledged that there are "formidable barriers" to ultimately finding such a duty. However, it is not "plain and obvious" that the claim is "hopeless" and, therefore, the claim should not be struck out at the pleadings stage.

The plaintiffs were two estates defrauded by an addicted gambler, Ms. Spinks, a law clerk who stole over $4,000,000. It is alleged that Ms. Spinks lost approximately $3,000,000 of that money in the defendant's casinos. The plaintiffs' claim was framed in negligence, unjust enrichment and knowing receipt of trust funds and, in short, alleged that:

- Ms. Spinks was a problem gambler;
- The defendant knew she was a problem gambler;
- The defendant knew problem gamblers sometimes steal to feed their habit;
- Ms. Spinks' gambling of vast sums of money over a relatively short period of time would have caused a reasonable person to suspect that the money may have been stolen and to make inquiries as to the source of the funds; and
- The defendant's failure to make inquiries contributed to the plaintiffs' losses.

The statement of claim did not allege any relationship or interaction between the plaintiffs and the defendant.

The defendant moved to strike the claim for failing to disclose a reasonable cause of action. The Motion Judge found that it was "plain and obvious" that the action could not succeed. On appeal, Justice Pardu and Justice Roberts reversed the Motion Judge's decision with Associate Chief Justice Hoy dissenting.

With respect to the claim in negligence, the majority of the Court of Appeal rejected the finding of the motion judge that the law was clear that casinos do not owe a duty of care to problem gamblers and, therefore, could not owe a duty of care to the plaintiffs

(victims of a problem gambler). Although the majority of the Court agreed that casinos cannot be expected to conduct an individualized assessment of each of their customers to determine the wisdom of the decision to gamble, more may be expected when an individual is obviously addicted to gambling and out of control. The majority of the Court was not persuaded that recognizing a duty of care to the victims of an obvious problem gambler in circumstances where a reasonable person would have realized the gambler could be using stolen funds would necessarily result in indeterminate liability.

The majority of the Court also drew an analogy between casinos and the commercial service of alcohol. The Court noted that in cases where an intoxicated individual drives and injures a third party, there is no relationship between the commercial host and the third party, but foreseeability and proximity has been found to exist with the class of persons who could be expected to be on the road.

The majority of the Court also found that the following considerations pertaining to commercial host liability would apply to casino operators:

1. The commercial nature of the relationship;
2. The costs of the over consumption (or "problem gambling") do not fall to the party creating the risk;
3. A direct relationship between the party creating of the risk and the reward; and
4. Gambling, like serving alcohol, is a regulated activity.

The majority of the Court of Appeal also disagreed with the Motion Judge on the tenability of the claims for unjust enrichment and knowing receipt of trust funds.

Associate Chief Justice Hoy disagreed with the majority. With respect to the claim in negligence, Justice Hoy noted that Canadian law has been extremely reluctant to impose a duty of care in cases alleging inaction and where the damages being claimed are for pure economic loss. Justice Hoy emphasized that foreseeability and proximity are heightened concerns in claims for economic loss. Justice Hoy also took issue with the majority's analogy between "problem gamblers" and commercial hosts. She distinguished these two types of cases on the basis that the law does not impose a duty on servers of alcohol to ensure that their patrons do not "drink away her or his family's earnings".

Although this decision may be viewed as an expansion of the concepts of foreseeability and proximity in negligence, the majority of the Court of Appeal did not go so far as to conclude that casinos owe a duty of care to third party victims of problem gamblers but, rather, only determined that the question should be answered with the benefit of a full factual record. Furthermore, the majority's decision on the tenability of the claim in negligence appears to have been based primarily on its novelty as opposed to a full application of the established *Anns/Cooper* analysis used to determine the existence of a duty of care. A full application of the *Anns/Cooper* analysis was conducted by Associate Chief Justice Hoy, who, in dissent, concluded that there was insufficient proximity between the plaintiffs and defendant and that the asserted duty of care would expose the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".

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