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Just Gambling? Ethical Challenges Pertaining to Gambling Provision, Policy and Research

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Presentation

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Should Casinos Owe a Duty of Care to their Loyalty Program Members?

At his best, man is the noblest of all animals; separated from law and justice, he is the worst.

- Aristotle

The truth is rarely pure and never simple.

- Oscar Wilde

Disclosure of Potential Conflict of Interest

Consulting Fees:

- **Consultant/expert witness in alcohol-related lawsuits 2000-17**
- **Consultant/expert witness in gambling-related lawsuits 2010-17**

Note: All reports were for consideration by the courts. Each required signature on a form recognizing that the Expert's duty is to the court by providing opinion evidence that is fair, objective, and non-partisan, and that this duty prevails over any obligation owed to any party by whom or on whose behalf I was engaged.

Legal recourse through liability actions

- **3rd option to educational/policy strategies**
- **Mechanism of social justice**
- **Shapes interaction between business & patrons**
 - **Establish duties of care**
 - **Redress negligence/exploitation**

Opposition to a Duty of Care

1. No visible parallel to intoxication
2. Prevention a matter of individual responsibility:
“informed decision-making”
3. Self-regulation more desirable than (nanny) state
4. Unlimited liability from an unlimited class
5. Recovery of “pure economic loss” is rare

Statutory Duty of Care

S. 39 of the Ontario LLA

- Prohibits selling alcohol that intoxicates s/t increases risk of personal injury/injury to a 3rd party
- Grants a cause of action by injured 3rd party vs licensee who or whose employee sold the alcohol

S. 45 of the Ontario LLA

- “shall not permit drunkenness to occur on the premises”

Take-aways

- Neither section mentions problem drinkers/alcoholics
- Focus is on the requirement to control consumption
- Liability exposure established once the intoxication threshold is crossed & when harm occurs
- Liability primarily limited to 3rd party claims

Common Law Duty of Care

- **extends scope to harm to the over-served individual**
- **court acts on principles of jurisprudence**
- **independent of elected officials or alcohol providers**
- **precedent-setting ruling in 1973 (Jordan House)**
- **successive cases further specified and expanded the scope**

Anns Test for Duty of Care

Proximity: actions have a close/direct effect, ought to have had injured party in mind for potential harm

Foreseeability: risk of harm must be reasonably foreseeable

Absence of over-riding policy consideration: real (vs speculative) policy considerations must be examined

Part 1: Proximity

- exists directly at table games
- established by loyalty programs, which record and monitor:

Days Gambled	Table Minutes Played	Table Buy in	Table Average Bet	Table Win/Loss	Slots Minutes Played	Slots Win/Loss	Total Win/Loss	Cumul. Win/Loss
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Part 2: Foreseeability

- hypothetical member does not drink, smoke, use drugs
- member 7 years, slots only first 6 – mounting losses
- discovered 2+ cards possible, maximum bet, multi-line play
- started a table game in year 7, perceived a possible system
- developed computer simulations to refine system

Days Gambled	Table Minutes Played	Table Buy in	Table Average Bet	Table Win/Loss	Slots Minutes Played	Slots Win/Loss	Total Win/Loss	Cumul. Win/Loss
Benchmark	0	\$0	\$0	\$0	368	-\$63,871	-\$63,871	-\$105,072

Foreseeability (Continued)

Days Gambled	Table Minutes Played	Table Buy in	Table Average Bet	Table Win/Loss	Slots Minutes Played	Slots Win/Loss	Total Win/Loss	Cumul. Win/Loss
Benchmark	0	\$0	\$0	\$0	368	-\$63,871	-\$63,871	-\$105,072
Day 1/May 1	126	\$80,900	\$11,332	\$105,800	52	\$16,870	\$122,670	\$17,598
Day 2/May 4	0	\$0	\$0	\$0	124	\$88,128	\$88,128	\$105,726
Day 3/May 7	83	\$55,000	\$1,330	\$25,000	71	\$3,400	\$28,400	\$134,126
Day 4/May 9	32	\$2,900	\$1,000	\$4,600	396	\$62,110	\$66,710	\$200,836

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Day 4/May 9	32	\$2,900	\$1,000	\$4,600	396	\$62,110	\$66,710	\$200,836
Day 5/May 13	1104	\$544,000	\$3,885	-\$535,200	309	-\$2,248	-\$532,952	-\$332,116
Day 6/May 14	476	\$543,100	\$8,856	-\$540,200	728	\$8,235	-\$548,435	-\$880,551
Day 7/May 16	81	\$102,000	\$10,000	-\$99,000	654	\$631	-\$98,369	-\$978,920
Day 8/May 17	179	\$6,100	\$1,245	-\$6,500	3125	-\$13,468	-\$19,968	-\$998,888
Day 9/May 25	243	\$26,000	\$812	-\$32,300	3420	-\$10,657	-\$42,957	-\$1,041,845
Day 10/May 30	479	\$363,900	\$8,427	-\$264,500	505	-\$2,609	-\$267,109	-\$1,308,954

Data bases will almost certainly show:

- **400+ gambling sessions**
- **Betting as much as \$30,000 per one-minute hand**
- **Losing over one million dollars in a day**
- **Gambling as many as 26 days a month, and**
- **Gambling for 24 hours and into the following day**
- **Cumulative losses exceeding \$10 million**

Foreseeability: Three Contextual Issues

The casino is not a neutral/benign environment:

- 1. voluntary standards (undertakings and commitments)**
- 2. deceptive practices (game design & operations)**
- 3. Inducements (loyalty program)**

1. Undertakings and Commitments (OLG web site)

1. We are committed to making sure *each customer's experience is positive*
2. We promote *high standards* of responsible gambling
3. We *assess our impact* on the customer's experience in *everything* we do
4. We live up to *high standards of fairness and ethical behaviour*
5. We are *accountable* for acting in the *best interests of our customers*
6. Responsible Gambling Code based on *accountability and transparency*
7. We assist in the *prevention* and mitigation of problem gambling

2. Deceptive Practices

- **Slots:** near misses, losses disguised as wins, stop buttons, multi-line play, reserving machines
- **Operations:** ATMs, note pads & pencils, identifying hot slots
- 24/365, credit & “front end” accounts, extreme max bets

“conscious efforts to undermine personal responsibility”

3a. Inducements

Normalization of Extreme Expenditure

“Earning Rewards Points is a rewarding experience.”



- \$1 - \$19,999 every 6 months
- \$20,000 - \$99,999 every 6 months
- \$100,000 + every 6 months

“The more points you *earn*, the higher you can go.”

3b. Inducements: Stimulators & Accelerators

- **Personal account managers assigned**
- ***Unsolicited* rewards/comps**
- **Weekly time limited offers**
- **Remove barriers: limousines, hotel rooms**
- **Prime/discount gambling - \$2,000 matched play**
- **VIP labelling & differentiators**

3c. Inducements: Engaging High Loss Members

“Our offers, benefits, services, and entertainment are only part of what makes your membership in our VIP program so special.

You are part of the circle of close-knit customers and casino staff members – like me – who make up the [Casino] family.

Because you are a valued member of this family, I want you to feel at home here every time you visit.

If there is ever anything I can do to make your experience at [Casino] even better, please don't hesitate to ask. That's why I'm here.”

–Signed: [Casino] CEO

Problem Gambling and Harm Re-framed

Core attributes: deception, inducement, odds, intermittent reinforcement

- undermine intentions to maintain affordable limits
- ever-present, ubiquitous, and relentless
- render even sophisticated educational efforts impotent
- environment with myriad accelerators, no brakes

**Problem gamblers and those experiencing harm are
those who “*respond exactly as intended*”**

Part 3: Overriding Policy Considerations

(“unlimited liability for an unlimited class”)

- **extreme circumstances (Paton) limits class size (top 1-2%)**
- **% of fault spread across all parties w. material contribution**
- **alcohol plaintiffs typically apportioned up to 50% fault**
- **pre-threshold losses could be eliminated**
- **OLG could eliminate all exposure through compliance**

SCC categories for pure economic losses

- 1. The independent liability of statutory public authorities**
- 2. Negligent misrepresentation**
- 3. Negligent performance of a service**
- 4. Negligent supply of shoddy goods or structures**
- 5. Relational economic loss**

Final Thoughts

- Deeply conflicted provincial governments unlikely to adopt effective policy responses.
- The courts should assess whether practices involved in acquiring gambling revenues should be subject to a duty of care.
- To date, the OLG end-game strategy has been to settle before trial.

The test awaits the appropriate plaintiff determined not to settle