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

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1. Introduction

It is commonly believed that health and social problems, including the harm arising from gambling, can best be addressed through educational and policy-based strategies. But what options exist when both strategies are compromised to the extent that measures for the prevention and mitigation of harm are effectively undermined? Perhaps for more than any other health issue, this circumstance describes gambling in Canada, where pecuniary interests have forestalled meaningful action, and a great deal of related harm occurs without impediment.

Potentially, however, legal recourse represents a third option. In analogous circumstances, liability actions undertaken through independent courts of law have been able establish standards for interactions between businesses and their patrons, including the recognition of duties of care and the redress of negligence or exploitation. This paper reviews how duty of care and negligence principles have been applied to alcohol providers in Ontario, and argues that parallel expectations are justified in relation to the loyalty program members of casinos. In addition, it endeavours to address misunderstandings and misrepresentations about alcohol liability, and to reframe core constructs or "governing images", which have been heavily influenced by gambling interests in discourse to date,.

Opposition to a duty of care comes primarily from gambling interests, including casino operators, the Ontario Lottery and Gaming Corporation (OLG), the government of Ontario, and an active segment of international academics and researchers. In general, they offer four arguments:

1. Gambling has no visible parallel to intoxication and, therefore, it is not possible to identify patrons at risk or experiencing harm;
2. Prevention should be a matter of individual responsibility, and the gambling provider's responsibility stops at providing information for "informed decision-making";
3. Self-regulation on the part of gambling providers is more desirable than regulation imposed by the (nanny) state; and
4. A duty of care would create unlimited liability exposure to providers from an unlimited class.

Of note, the first three are strategies drawn from what has been described as the Big Business playbook[2], as is seizing control over definitions and discourse, and are designed to neutralize opposition to revenue generating tactics. All are addressed in the course of this paper.

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[1] Gambling interests have been known to label those who express concerns as "anti-gambling advocates". Accordingly, I make it a practice to put on record that I am in no way opposed to gambling *per se*, but stand steadfast against gambling harm.

[2] Brownell, K. D. & Warner, K. E. (2009). *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?* The Milbank Quarterly, Vol. 87, No. 1.

2. The Duty of Care for Alcohol Providers

The following review of alcohol liability draws from my experience as a consultant and/or expert in 67 alcohol-related liability actions in Ontario over the past 17 years, and has been further informed by my involvement in five gambling-related actions over the past seven years.

2.1 Legislative and Regulatory Duty of Care

The Liquor Licence Act of Ontario (LLA) sets out relevant provisions in Sections 39 and 45.

First, S. 39 prohibits:

a) *Excessive service* – selling alcohol to a person that apparently intoxicates or increases intoxication, and

b) *Increasing risk* – placing that person in danger of personal injury or causing injury to another person, and then

c) *Establishes liability* – If the intoxicated person causes injury or damage to another person . . . [that person] is entitled to recover compensation from the person who or whose employee sold the alcohol (R.S.O. 1990, c. L.19, s. 39).

Second, S. 45(1) states that the licence holder "*shall not permit* drunkenness . . . to occur on the premises" (R.R.O. 1990, Reg. 719, s. 45(1)). Here, the word "permit" is key, as the courts and the provincial regulator have interpreted it as meaning "fail to prevent"[3]. Thus, the standard effectively becomes "the licence holder *shall not fail to prevent* drunkenness".

Of note, neither section is concerned with problem drinkers or alcoholics, and focus solely on controlling consumption such that the risk of harm is not increased. They place onus on licensees and their employees to unfailingly prevent over-consumption. Contrary to the position of gambling interests, once signs of intoxication become evident, the law has been broken and liability exposure established.

2.2 Common Law Duty of Care

The legislative duty of care in Ontario does not extend to non-lethal injury suffered by the patron who has been over-served, which is the most common form of harm. Here, a complementary duty, established under common law, does extend the scope to harm suffered by the individual who is over-served. To establish a common law ruling, the court acts on principles of jurisprudence, independent of the desires of elected officials or the interests of alcohol providers. Following a precedent-setting ruling in 1973[4], successive cases have further specified and expanded the scope of the duty[5].

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[3] For court decisions, see: *Sand Bar,* [1999] O.A.G.C.D. No. 64 and *Heart & Crown Pub & Restaurant*, 1999] O.A.G.C.D. No. 288. For the regulator's position, see: Alcohol and Gaming Commission of Ontario (AGCO), Decision on Findings re: 1197801 Ontario Inc. O/A Body English/Body Rok, 2008 Canlit II 52551 (ON A.G.C.); September 16, 2008.

[4] *Jordan House Ltd. v. Menow*, 1973 CanLII 16 (SCC), [1974] S.C.R. 239.

[5] Chamberlain, E. *Alcohol Provider Liability in Canada and the United Kingdom: Legal and Cultural Influences. P*resentation to the British Association of Canadian Studies (BACS) Legal Group (London, England, 3 July 2003).

Under common law, Canadian courts draw upon the "Anns-Cooper test"[6] to determine whether a duty of care applies in a given circumstance. The test consists of three parts:

> **Proximity:** There must be a relationship such that the actions of the alleged wrongdoer have a close or direct effect on the victim, and that the wrongdoer ought to have had the victim in mind as a person potentially harmed.
>
> **Foreseeability:** The risk of harm must be foreseeable, using the standard of the "reasonable person".
>
> **Absence of over-riding policy consideration:** Here, real (rather than speculative) policy considerations must be examined including, as in the case of gambling, that the duty does not create an "unlimited liability to an unlimited class".

In light of the above, the following section considers whether a duty of care should be established in relation to members of casino loyalty programs.

3. Does the Anns-Cooper Test Apply to the Loyalty Program Members of Casinos?

3.1 Proximity

Loyalty program membership in and of itself establishes proximity of relationship far beyond that of the alcohol licensee and patron. In addition to acquiring personal contact information, loyalty programs record:

- the frequency of gambling and the duration of each session, (separately for slots and tables),
- the average bet size at table games per session,
- the win/loss status per session (separately for slots and table games), and
- cumulative win/loss since the initiation of membership

These records are consulted on an ongoing basis in order to calculate, communicate, and reimburse "rewards". As total amounts bet increase, members are specifically awarded status levels (e.g., Gold or Platinum status) and, at a certain spending threshold, are assigned a personal account manager.

3.2 Foreseeability

As mentioned, gambling interests portray the dearth of visible signs analogous to intoxication as a trump card, suggesting that no further discussion is needed. Beyond this, OLG advises that casino staff are not health professionals, and cannot be expected to diagnose problem or pathological gambling.

Whether loyalty program data do indeed permit the identification of risk and potential harm might be well assessed by examining a hypothetical but representative case study. Using metrics similar to those I have encountered in my experience to date, and from discussions with people who have experienced substantial loss, I offer a composite illustration. This hypothetical patron is a male who has been enrolled for 7 years, and does not drink, smoke, or use drugs. He has the following history:

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[6] *Anns* v *Merton London Borough Council* [1978] AC 728 (HL), reaffirmed by the Supreme Court of Canada in *Cooper* v *Hobart* (2001) 206 DLR (4th) 193.

- For the first six years, he gambled exclusively on the slots;
- In year seven, he discovered that he could acquire more than one loyalty card, each with the same membership number, and then began to play multiple slots at a time, maximizing bets on multi-line machines;
- That same year, he began to play at a table game, and came to believe that he could devise a winning system. He began working on computer models to develop, test, and refine a system;
- Through multiple win/loss cycles, cumulative losses over seven years had climbed to $105,000.

A snapshot of this hypothetical member's experience begins in May of Year 7, immediately before the trial run for his winning system. Table 1 reflects events that, in this example, transpired over the 30 day period that followed, beginning with the launch of the trial run on Day 1.

Table 1: Illustrative Case Study of Loyalty Program Data

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
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

Day 1 – Day 4

- The Day 1 test for the table game system saw a buy-in of over $80,000 over a 2-hour period and an average bet size over $11,000. He realized a win of over $105,000 which confirmed his faith in the system. In addition, his high-bet simultaneous play at multiple slots added a win of over $16,000, and the combined wins brought him into a positive cumulative position.

- The table game system again aligned with positive results in days 3 and, to a lesser extent in Day 4. Meanwhile, his slots play across the four days realized substantial wins totalling $170,508, and his multi-machine play recorded an all-time high of 6.6 hours.
- Overall, his cumulative status transformed from a $105,000 loss to a net win of over $200,000 in four gambling days across nine calendar days.

Over these same four days, cells shaded in yellow suggest where "red flags"[7] might have been raised in relation to identifying elevated risk and the potential for harm. These include unprecedented daily buy-ins of $80,900 and $55,000; an average bet size of $11,332; single day wins of $105,800 and $25,000; and extremely high daily slots wins as high as $62,110. All could be argued as opportunities for prudent early intervention within a larger goal of preventing subsequent harm.

Day 5, 6, and 7

- Day 5 sees a full commitment to the winning system, where he logs 17 hours at the tables, with a buy-in of $544,000 and, combined with a "small" loss at the slots, records a loss of $532,952;
- He returns the following day, and gambles for eight more hours with a buy-in of $543,100; his average bet size increases from $3,800 the day before to $8,800; 12 hours of slots play yields a win of $8,235. Day 6 records a net loss of $540,000, driving his cumulative loss to $880,551;
- He returns on Day 7, two days later, with a $102,000 buy-in and an average bet size of $10,000; he loses an additional $99,000; pushes his cumulative loss to $978,920.

Day 8 and 9

- Days 8 and 9 both see losses at the tables totalling $32,100; his recorded slots play is approximately 52 hours on Day 8 and 57 hours on Day 9 – were he to have played three machines simultaneously, these times would translate to approximately 17 and 19 hours;
- His losses over these days moved the cumulative total to over $1 million.

Day 10

- He launches an 8-hour session at the tables on Day 10, with a buy-in of $363,900 and an average bet size that moves back up to $8,427; he loses $264,500 at the tables and, with a relatively small loss at the slots, realizes a net loss of $267,109;
- His cumulative loss climbs to $1.31 million; he does not return for the next month;
- He has lost more than $1.5 million since Day 4, when he was ahead by $200,836

From a harm assessment perspective, Day 5 arguably should have set off emergency alarms, which would remain loud and ceasless throughout the final five days of gambling. Virtually every metric over these days conveys an unambiguous message of extreme risk, a high likelihood of distress, and a reasonable probability of harm.

[7] Casino employees in Ontario undergo training, provided by the Centre for Addiction and Mental Health (CAMH) to identify "Red Flag" signs of potential distress.

These metrics are by no means the worst seen by Ontario casinos. It would not be inconceivable for a patron, as portrayed in the above illustration, to have continued gambling well beyond the time frame portrayed. Although casinos steadfastly refuse to provide summary information from data bases, they will almost certainly contain records that show members:

- Betting as much as $30,000 per one-minute hand[8];
- Losing over one million dollars in a single day;
- Gambling as many as 26 days a month;
- Gambling continuously for 24 hours and into the following day; and
- Incurring cumulative losses that exceed $10 million.

3.2.1 Contextual Considerations

The potential foreseeability of risk and harm occurs within the larger context of casino operations. Of particular interest in this regard are a) the standards voluntarily adopted by OLG, b) the deceptive nature of game design features, and c) the nature of inducements employed in loyalty programs.

Voluntary Standards

Further consideration of the information captured by loyalty program data bases benefits from being placed into context of the voluntary standards that OLG has adopted. The following set of undertakings and commitments are from the OLG web site:

Corporate Social Responsibility[9]: We are committed to making sure each customer's experience is positive.

Mission[10]: We will "promote high standards of responsible gambling".

Guiding Principles: a) We will assess our impact on the customer and their experience in everything we do; and b) We will foster a healthy, sustainable player base through education, risk reduction, and player assistance.

Values: a) *Integrity:* We believe in doing the right thing. We do what we say and live up to high standards of fairness and ethical behaviour; and b) *Stewardship:* We set high standards and are accountable for acting in the best interests of our customers;

Responsible Gambling Code[11] is based on principles of accountability and transparency.

Goal[12]*:* We will assist in the prevention and mitigation of problem gambling.

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[8] The posted limit per single table game bet in Ontario is $15,000, but casinos have the power to increase this limit at their sole discretion.

[9] http://about.olg.ca/corporate-social-responsibility/ (All web site references accessed March 15, 2017)

[10] Statements of Mission, Guiding Principles, and Values are located at: http://about.olg.ca/our-mission-values/

[11] http://about.olg.ca/wp-content/uploads/sites/28/2016/07/RG_CodeofConduct_PDF_EN.pdf

[12] http://about.olg.ca/responsible-gambling/

Although voluntarily assumed, it can be reasonably anticipated that OLG is prepared to be held to its public undertakings and commitments, and to ensure that contracted casino operators adhere to them.

Deceptive Practices

A second contextual consideration is that casinos, with full knowledge and intent, incorporate deception into game design and operating practices. For slot machines, these include: programming near misses and losses disguised as wins, incorporating stop buttons that don't influence outcomes, encouraging multi-line slots play, and allowing patrons to reserve particular machines. Operating practices include the ubiquitous placement of ATMs, supplying note pads to record table game outcomes, and identifying slot machines that haven't paid out recently. Complementary accelerators of gambling involvement and loss include opening 24 hours a day, 365 days a year, offering credit and "front end" accounts, providing cash advances on credit cards (and waiving fees), and permitting extremely high maximum bets.

Each of the above practices is well aligned with undermining personal responsibility and pre-set limits.

Inducements

Casinos actively induce increased gambling involvement in several ways, many of which are tied to loyalty programs. At a general level, they normalize excessive spending through tiered membership levels. For example, casino members are invited to "earn" gold and platinum level status by gambling a minimum of $20,000 and $100,000 respectively over each six-month period, in one instance actually proclaiming "Earning Rewards Points is a rewarding experience".

At specified spend levels, members are offered unsolicited comps, and are assigned dedicated account managers who greet them upon arrival, phone with offers of limousine transportation and overnight hotel stays, and write personalized monthly letters with time-limited offers of hotel, restaurant and "matched play" vouchers for up to $2,000. They endeavour to establish relationships and personalize their letters with text such as:

> "I hope this letter finds you and your loved ones doing well."
>
> "Greetings from your friend at [Name] Casino!"
>
> "As always, I thank you for trusting us to make the most of your valuable leisure time. Rest assured that we take that trust seriously."
>
> "Your recent business, for which I sincerely thank you, has earned $1200 in Match Play offers";
>
> "As a [VIP] member, 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 experiences even better, please don't hesitate to ask. That's why I'm here."
>
> Signed, the Casino CEO

In its 2011 report, the Australian Productivity Commission gained access to a casino loyalty program data base, and found that 2.4% of members generated 76% of loyalty membership revenue[13].

3.3 Problem Gambling and Harm Re-framed

In addition to the contribution of deceptive practices and loyalty programs, two other major accelerators of excessive and harmful gambling are uneven odds and intermittent reinforcement. These four core attributes of casino environments synergistically act to undermine gamblers' intentions to remain within affordable limits. They are ever-present, ubiquitous, and relentless, and tend to escalate pressure to gamble more as losses mount. They render even the most sophisticated educational efforts impotent, and undermine anything like the level playing field needed for a personal responsibility ideology to be contemplated.

Perhaps of greatest importance: despite the multiple accelerators applied by these attributes, there are no brakes – gamblers are driven, induced yet unimpeded, "to extinction"[14].

Core constituents of the problem gambling construct are excessive involvement and harm. On light of the above, problem gamblers and those experiencing harm might most appropriately be appreciated as casino patrons who "*respond exactly as intended".*

3.4 Overriding Policy Considerations

The final part of the Anns-Cooper test considers whether there are overriding ("residual") policy considerations that preclude a duty of care ruling. Gambling interests postulate a floodgate of claims from anyone who has lost money, thereby creating an unlimited liability for an unlimited class.

In this regard, it is helpful to consider the recent comments of the provincial and appeals court judges in the ongoing Paton case[15]. In contemplating the attributes of a potentially successful duty of care case, both judges suggested that extreme and unambiguous circumstances would have to be evident in order to meet the "foreseeability" part of the test. In relation to cumulative losses, this "extreme" criterion would likely limit the class to the top one or two percent of loyalty program membership. By definition, it would not only reduce the size of the eligible class of complainants but also render it quantifiable. In so doing, concerns about creating an unlimited class would be eliminated.

The question of an unlimited liability still requires consideration. In alcohol-related cases, "fault" is apportioned by the court across involved parties, and a percentage of responsibility assigned to each. These percentages are then applied to the dollar value of the damages accepted by the court. Thus, an intoxicated patron is commonly held up to 50% at fault, and only awarded the difference from the remaining parties. This principle can be expected to be similarly applied in gambling-related cases. For example, in the hypothetical illustration described earlier, if the loyalty club member were assigned 50%

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[13] Banks, G. *Evidence and social policy: the case of gambling*. Presentation to South Australian Centre for Economic Studies, Corporate Seminar, Adelaide, 30 March 2011.

[14] Dow Schull, N. (2012). *Addiction by Design*. Princeton, NJ: Princeton University Press.

[15] See: Paton Estate v. Ontario Lottery and gaming Commission (sic), 2015 ONSC 3130; and Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford), 2016 ONCA 458.

responsibility for the harm, and OLG and the casino were each assigned 25%, the providers would have to repay half of the losses. Accordingly, if the plaintiff lost $1.3 million, the providers would repay $650,000 and retain a similar amount as revenue *from a single patron*. Finally, the court might rule that some of a plaintiff's losses occurred before the threshold at which a duty of care applied, thereby reducing the dollar valuation for the harm and corresponding amounts to be repaid by the providers.

In summary, the size of eligible class likely would be substantially reduced and quantifiable should the "extreme" criterion be applied, and any awards against providers would entail returning only a portion of the substantial revenue derived from the plaintiff.

In the final analysis, it must be appreciated that liability exposure could be completely avoidable following a precedent-setting case. As with alcohol, the court would establish standards of care within the duty[16] which, in turn, would constitute criteria for compliance. Gambling standards might include the definition of risk thresholds and interventions that should be delivered in response. In alcohol-related cases, a valid defence is for licensees to establish that the relevant standard was applied in the case at hand. It follows that, by ensuring that all court-specified standards were implemented across Ontario casinos, OLG would have complete ability to eliminate its liability exposure under the duty of care.

Claims of an unlimited liability to an unlimited class are certainly contestable and may well be unfounded.

Finally, it has been argued that the courts will be unlikely to establish a duty of care for casinos because the losses are "purely economic" and, therefore, potentially indeterminate[17]. Of course, to argue that something is unlikely to occur because it has yet to occur is at odds with the court function of establishing precedents when appropriate circumstances are presented. The question is whether a case framed and argued as herein presented would constitute such circumstances.

The Supreme Court of Canada has recognized five categories of negligence claims for which a duty of care has been found with respect to pure economic losses[18]. Although it is beyond the scope of this paper to argue how each or any category might apply, some alignment with arguments made earlier is apparent. The categories identified by the Supreme Court are identified below, and preliminary suggestions for arguments are offered in parentheses.

1. The Independent Liability of Statutory Public Authorities

(e.g., OLG as the authority, in relation to its undertakings and commitments and its failure to manage the formal relationship and associated exchanges between contracted casino operators and loyalty program members regarding the prevention of harm);

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[16] In Ontario, a server training program has been accepted by the court as the standard of care. See: *Dryden (Litigation Guardian of) v Campbell Estate*, 2001 OJ 829.

[17] Cameron J (2007). *Problem Gamblers and the Duty of Care: a Response to Sasso and Kalajdzic*. Gaming Law Review. Vol 11, No 5.

[18] Canadian National Railway Company v. Norsk, [[1992] 1 S.C.R. 1021.

2. Negligent Misrepresentation

(e.g., the failure to ensure that the undertakings and commitments made by OLG are fully implemented by contracted casino operators);

3. Negligent Performance of a Service

(e.g., under OLG's requirement to conduct and manage gambling, the failure to prohibit contracted casino operators from inducing loyalty program members to gamble more in the face of information which reasonably indicates the probability of or elevated risk of harm);

4. Negligent Supply of Shoddy Goods or Structures

(e.g., consistent with OLG's requirement to conduct and manage gambling, the failure to adopt organizational policies and procedures that mandate monitoring for potential harm and intervening in response to a reasonable probability of harm);

5. Relational Economic Loss

(e.g., whether OLG and contracted casino operators have sufficient relationship, based on OLG's posted undertakings and commitments and loyalty program data, such that that they can be viewed as exploiting a relationship that ought to have been safe).

4. Final Thoughts

Given the unique extent to which provincial governments are in direct pecuniary conflict, and the Criminal Code requirement that only they are empowered to "conduct and manage" gambling in Canada, there is a need for a third party to dispassionately reconcile the balance between revenue generation and protecting public health. To date, provincial governments appear unwilling to voluntarily curtail any revenue from the prevention of harmful gambling and, consequently, have introduced no measures shown to effectively prevent harm. Accordingly, it is reasonable that the courts assess whether practices involved in acquiring these revenues should be subject to a duty of care.

To date, OLG's strategy has been to settle lawsuits before proceeding to trial, thereby precluding judicial consideration. The test, therefore, awaits an appropriate plaintiff who is determined not to settle.

In the meanwhile, our society remains befuddled by the magical thinking of the "paradoxical strategy", expressed through statements such as,

> "A balance is required between various strategies to ensure that gambling-related harms are minimised, without overtly disrupting recreational gamblers or gambling-related businesses.[19]"

Now, there's an outcome you shouldn't bet on.

[19] Gainsbury, S., & Blaszczynski, A. (2012) Harm minimisation in gambling. In R. Pates & D. Riley (Eds). *Harm reduction in substance use and high-risk behaviour: International Policy and Practice*. Oxford: Wiley-Blackwell. Pp. 263-278.