CITATION: Dennis v. OLG, 2010 ONSC 1332
COURT FILE NO.: CV-08-00356378-000
DATE: 2010-03-15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE	)	*Jerome R. Morse* and *Hassan A. Fancy*, for the Plaintiffs/Moving Parties
Plaintiffs/Moving Parties	)	
– and –	)	
ONTARIO LOTTERY AND GAMING CORPORATION	)	*James Doris, Matthew Milne-Smith a*nd *Shelby Z. Austin*, for the Defendant/Respondent
Defendant/Respondent	)	
	)	**HEARD:** January 13, 14 and 15, 2010

CULLITY J.

[1] The plaintiffs, Mr Dennis and Ms Noble, moved for certification of this action under the *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 ("CPA"). They seek to represent a primary class of approximately 10,428 individuals who signed "self-exclusion" forms provided by the Ontario Lottery and Gaming Corporation ("OLGC") between December 1, 1999 and February 10, 2005 (the "class period"). The action is brought to recover gambling losses subsequently incurred as a result of OLGC's alleged failure to exercise its best efforts, and to take care, to exclude them from its gambling venues. There is a secondary class consisting of family members who have claims under section 61 of the *Family Law Act*, R.S.O. 1990, c. F. 3 that are dependent on those of members of the primary class.

[2] The statement of claim was issued on June 9, 2008 and was amended on March 27, 2009 and December 9, 2009. Declarations and damages are claimed against OLGC for negligence, occupiers' liability and breach of contract. In the alternative, the plaintiffs seek a disgorgement of revenues, net income or profits derived by OLGC from the class members. In the aggregate, the damages claimed – including punitive damages – amount to $3.5 billion.

[3] OLGC is an agent of the provincial Crown. It was incorporated by statute on the amalgamation of the Ontario Lottery Corporation and the Ontario Casino Corporation ("OCC") on April 1, 2000. As a result of the amalgamation, it became vested with all the rights, property, assets, liabilities and obligations of the amalgamating corporations. For the most part, it will not be necessary to distinguish between these entities and, unless otherwise indicated, my references to OLGC will refer to its predecessor, OCC, at any relevant times before April 1, 2000.

[4] OLGC has not yet delivered a statement of defence.

BACKGROUND

[5] The action involves the response of a government agency to the recognized serious social problem of addictive or compulsive gambling. The legal issues must be viewed against a background of a system operated primarily to make profits for the government from the gambling losses of the persons who use its facilities. The tension between maximising profits and promoting responsible gambling to the financial detriment of OLGC is acute. Government policy is involved to an extent that political resolution may be more appropriate and more effective than judicial proceedings.

[6] Although plaintiffs' counsel have attempted to frame the claims advanced on behalf of the class quite narrowly, it is likely that, at a trial, the question of distinguishing between justiciable and non-justiciable issues will need to be confronted.

[7] This, however, is entirely a procedural motion in which the general question is whether it will be appropriate for the claims of class members to be pursued under the procedure in the CPA, or in individual actions. The issues of political and social policy remain in the background and they will not be addressed directly by a decision to grant or deny certification. Nor, in my opinion, should the financial consequences to the government and the taxpayers of Ontario - if the plaintiffs are successful - have a bearing on the decision.

1. Legalised Gambling in Ontario

[8] Under sections 201 through 207.1 of the *Criminal Code*, R.S.C. 1985, c. C. 46, it is an offence to conduct the business of organized gambling in Canada unless the activity falls within one of the specific exemptions provided in those provisions. One such exemption is contained in section 207 (1) (a) which provides that it is lawful 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.

[9] Further exemptions relate to lottery schemes conducted by charities, religious organisations, fairs and exhibitions pursuant to licences issued by the Lieutenant Governor in Council.

[10] For the purpose of the exemptions. the term "lottery scheme" is broadly confined to include, among other things, any scheme, contrivance or operation of any kind for the purpose of determining who, or holders of what lots, tickets, numbers or chances, are the winners of any property.

[11] In 1992, prior to the incorporation of OCC, more than $4 billion was spent in legalised gambling on horseracing, bingo and lotteries in Ontario. The decision to introduce casino gambling was made in 1992 and OCC was incorporated in the following year. A pilot project - Casino Windsor - opened in 1994 and the gambling facilities provided by OCC, and now OLGC, have since expanded considerably.

[12] The objects of OLGC are set out in section 3 of the *Ontario Lottery and Gaming Corporation Act, 1999,* S.O. 1999, c. 12 and include the following:

> 1. To develop, undertake, organize, conduct and manage lottery schemes on behalf of Her Majesty in right of Ontario.
>
> 2. To provide for the operation of gaming premises.
>
> 3. To ensure that gaming premises are operated and managed in accordance with this Act and the *Gaming Control Act, 1992* and the regulations made under the Acts.

[13] Ostensibly pursuant to the exemption in section 207 (1) (a) of the *Criminal Code,* OLGC currently operates:

> (a) four commercial casinos managed for it by private operators - Casino Niagara, Fallsview Casino Resort, Casino Rama and Casino Windsor;
>
> (b) six community casinos operated directly by OLGC; and
>
> (c) 17 slot gambling facilities located at racetracks in various parts of the province.

[14] OLGC has a proprietary interest in, and directs the operation of, the facilities under the supervision of the Alcohol and Gaming Commission which administers the *Gaming Control Act,1992,* S.O. 1992, c. 24, in accordance with government policy. In 2008, more than 42 million patrons visited one or more of these facilities.

[15] As yet unresolved questions have been raised by, among others, the authors of a paper prepared in July 2005 for the Law Commission of Canada in connection with the entitlement to an exemption under section 207 (1) (a) of the *Criminal Code* in respect of the four commercial casinos. In the submission of plaintiffs' counsel, OLGC has infringed the prohibitions in the *Criminal* Code by entering into its relationships with profit-driven commercial casino operators

and such relationships have compromised its ability to implement programs consistent with its public commitment to ensure responsible gambling.

2. Problem Gambling

[16] Social evils associated with gambling, and particularly organized gambling, have long been recognized and are reflected in the prohibitions in the *Criminal Code*. The decision to establish the pilot project in Windsor in the early 1990s raised opposition and concerns that focused on, among other things, the personality disorder generally referred to as "problem gambling".

[17] In paragraphs 28 and 29 of the statement of claim it is pleaded that Mr Dennis and members of the primary class he seeks to represent were problem gamblers in that they suffered from:

> ... a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble leading to excessive gambling.
>
> Key features of problem gambling include uncontrollable feelings and compulsions relating to gambling such as preoccupation with gambling, irrational repeated gambling to recover losses due to gambling and the development of tolerance to the risk of gambling which requires gambling at high stakes with the attendant greater risks of greater losses to obtain the same "high" (paras. 29 (a) and (b))

[18] The terms "problem gambling" and "pathological gambling" were discussed in a report prepared in 1993 by Ernst & and Young for the Ministry of Consumer and Commercial Relations. The term "problem gambling" was used in the report to apply to gambling that may compromise, disrupt or damage family, personal or vocational pursuits. It was said that in this sense it would, in most cases, be characterised as "pathological gambling", a term which refers to a recognized psychiatric disorder:

> ... which consists of frequent, repetitive episodes of gambling which dominates the individual's life to the detriment of social, occupational, material and other family values and commitments. Those who suffer from this disorder may put their jobs at risk, acquire large debts, and lie or break the law to obtain money or evade payment of debts. They describe an intense urge to gamble which is difficult to control, together with preoccupation with ideas and images of the act of gambling and the circumstances which surround the act. These preoccupations and urges often increase at times when life is stressful.

[19] The terminology was also discussed in an affidavit of Dr Robert Williams that was delivered on behalf of the plaintiffs and is referred to extensively later in these reasons.

[20] The existence and the social consequences of problem gambling were prominent in the legislative deliberations that led to the enactment of the *Ontario Casino Corporation Act* and they have received continuing recognition by the government and by OLGC.

[21] In an affidavit sworn for the purpose of this motion, Mr Paul Pellizzari - the Director of Policy of OLGC stated:

> Since introducing casino gaming in Ontario in 1994, Ontario has become a leading jurisdiction in North America concerning the prevention and treatment of problem gambling.

[22] Although the existence of problem gambling was known in Ontario prior to the introduction of casino gaming in 1994, the need for funds to be applied to its treatment and prevention had been virtually ignored by government. With the creation of the casinos it began to receive attention.

[23] Since 1999/2000, $322 million has been directed by Ontario to treatment, prevention and research initiatives with $40 million committed for 2009/2010. This, according to Mr Pellizzari, is greater than the amount expended on prevention and treatment of problem gambling in any other North American jurisdiction.

[24] In his affidavit, Mr Pellizzari refers to the development of responsible gambling initiatives by OCC and OLGC after 1994, as expertise with respect to problem gambling was acquired, and advances were made in scientific knowledge of the disorder. From the outset, each casino operator was required to implement responsible gambling strategies to raise awareness among its patrons, employees and community members.

[25] In 2008/2009, OLGC's expenditures on such initiatives were in the region of $9.5 million. This amount was in addition to the Ministry of Health's contributions to prevention, treatment and research from the gambling revenues it received from OLGC.

3. Self-Exclusion

[26] Section 32 (3) of Regulation 385/99 under the *Gaming Control Act* currently provides that the Registrar of the Alcohol and Gaming Commission can require the operator of a gambling facility - including OLGC - to implement and comply with a policy and program approved by the board of the Commission that provides "a process for players to exclude themselves from playing games of chance". Under section 32 (1) such operators are required to exclude from gambling individuals who advise the operators that they are participating in such a self-exclusion program.

[27] Although it appears that no directions have been issued under section 32 (3) of the regulation, OLGC's gambling facilities have offered a self-exclusion program since their inception. In paras 88 and 89 of his affidavit, Mr Pellizzari described the process as follows:

> Self-exclusion is a self-help tool to enable patrons to take positive action to address problems they may be experiencing with gambling. The objective of the self-exclusion program is to help patrons acknowledge their responsibilities over their gambling behaviour, and the potential implications of excessive gambling. Self-exclusion is a form of positive action patrons can take to address problems they may be experiencing with gambling.
>
> The patron initiates the self-exclusion process. To date, over 17,000 patrons have chosen to do so, and currently, approximately 12,500 remain self-excluded. In most cases a patron will identify himself or herself on the gaming floor to casino staff or security indicating that he/she wants to self-exclude. In administering its program, and when handling requests for self-exclusion enrolment, [OLGC] makes no determination of an individual's state or possible condition. The self-exclusion process does not require judgment, assumption or assessment that a self-excluded patron is in fact a problem gambler or a pathological gambler.

[28] The self-exclusion process, which in different forms, has been used in the United States, other Canadian provinces and European countries, is based on an awareness that problem gamblers often have "moments of clarity" in which they recognise the existence of the problem, the disastrous consequences it can have for them and their families, and the need to obtain assistance to prevent them from giving in to their weakness.

[29] Under OLGC's practices, patrons who wish to self-exclude are interviewed by casino staff and required to provide photo identification and to sign a self-exclusion form. The forms signed by Mr Dennis and the other members of the primary class were identical in all material respects. That signed by Mr Dennis was as follows:

> Self-Exclusion Form
>
> Ontario Lottery and Gaming Corporation
>
> We offer you the opportunity to self-exclude yourself from Ontario Lottery and Gaming Corporation (OLGC) gaming venues. Self-exclusion will direct the OLGC, and commercial casino operators acting for OLGC, to use their best efforts to deny your entry, as a service, to all OLGC's gaming venues in the province of Ontario. The OLGC and commercial casino operators accept no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested.
>
> I hereby request that I be refused entrance to all OLGC gaming venues (a list of which has been provided to me), and be prohibited from entering on

> to, or in any way trespassing upon any of these gaming venues, for any reason whatsoever save solely to attend at my place of employment if applicable, as of this date. I understand that this form and my photograph will be shared with the other gaming venues.
>
> This self-exclusion shall be for an indefinite time period and can be reinstated only after a minimum period of six months, at which point I may request in writing reinstatement in any of the venues. Once reinstatement is granted, it applies to all venues from which I was excluded. This self-exclusion form cannot be revoked or withdrawn until such time as I notify, in writing, the Security Office at any one of the gaming venues and only after the minimum period of six months. Upon signing a required reinstatement request I must wait an additional 30 days before being allowed to play at any of these venues. If this is the third request for self-exclusion at any of the gaming venues within the last three years, I will automatically be self-excluded for a minimum of five years at all the relevant gaming venues.
>
> I understand that my failure to comply with this voluntary ban may mean that I will be apprehended for trespassing and dealt with according to law. I release and forever discharge the OLGC, and the commercial operators of any of the operator's parent companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their directors, officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

[30] The form then provided for details of the signatory's name and address, the identification provided, the identification number, date of birth, and telephone number. The name of an employee who was present at the interview was then to be provided and, at the end of the form, the number of a helpline was given for the signatory to obtain information about problem gambling, and treatment resources in Ontario.

[31] The versions of the form used before the commencement, and after the end, of the class period contain no reference to a direction to OLGC to use its best efforts to deny entry to the signatory. As I will indicate, the existence of the direction is fundamental to the manner in which the claims advanced by the plaintiffs have been framed. Another difference is that the form introduced as of February 10, 2005 specifically denied any responsibility of OLGC or its employees to prevent self-excluded persons from entering or remaining on the premises and from gambling while there.

EVIDENCE

[32] A vast amount of material was filed for purpose of the motion. The plaintiff's motion record filled 15 substantial volumes. Much of the evidence was directed at the merits of the claims advanced on behalf of the class members rather than at the requirements for certification. However, this is a case in which a great deal of the evidence that is not directly relevant to those requirements is of assistance in explaining the factual context in which the certification issues arise.

1. Evidence in Support of the Motion.

[33] In addition to affidavits filed by each of the plaintiffs, the motion record contained two affidavits of one of their lawyers - Ms Lori Stolz - and affidavits of two experts, Professor Kevin Harrigan of the University of Waterloo and Dr Robert Williams of the University of Lethbridge, Alberta.

(a) Peter Dennis

[34] Mr Dennis is 50 years of age. In the records of the Centre for Addiction and Mental Health he is described as an “intelligent and insightful man”.

[35] Mr Dennis was born in India and, after attending high school, worked in the tourism and travel industry until, in the mid-1980s, he became a sales manager for a large travel agency in Dubai. He remained in that position for 16 years during which he married Ms Noble and their two children were born.

[36] Mr Dennis states that the family was doing well financially and had acquired savings when, in 1997, they emigrated to Canada. On arrival, he and Ms Noble enrolled in various courses to upgrade their skills and very quickly obtained employment by American Express. Feeling secure in their financial position, they purchased a house in Markham, in June 1998 with a cash down-payment of $26,280 and a mortgage of $189,700.

[37] In July 1998, when some relatives from the United States were with them, Mr Dennis first visited one of OLGC's gambling facilities. Thereafter, he would go to Casino Rama once or twice a month - at first with his wife on occasions when he would wager no more than $500. Subsequently, when she refused to accompany him to the casino, he began to go there by himself after telling her he was otherwise occupied. In 2000, he discovered the slot games at Woodbine and began to visit there frequently and to lose increasingly large amounts. He states that he could not stop himself from gambling and that he continued to do this throughout 2001, 2002, 2003 and 2004.

[38] Mr Dennis's employment with American Express was terminated in 2002 when he was earning approximately $40,000 a year. Because of his losses from his uncontrollable gambling, he had previously had to take out a second mortgage on their home. He subsequently defaulted on this and the first mortgagee sued for possession. At this time Mr Dennis was receiving

unemployment insurance but spending it on visits to Woodbine. The severance payment he received from American Express had already been dissipated in the same way.

[39] In March 2003, Mr Dennis obtained another mortgage and a private loan to enable him to pay off the first and second mortgages. By the end of that month, he had incurred gambling losses of $88,000 since the beginning of the year. In this period Mr Dennis would gamble at Woodbine during the day while his wife was working and his children were at school. He would lie to her about his activities. His gambling continued in amounts considerably in excess of his annual income.

[40] By May 2004, Ms Noble was aware of what was happening and desperate about their increasingly fragile financial situation. Earlier in the year they had defaulted on the latest mortgage and had retained possession of their home only by transferring title to friends who obtained a mortgage on it and rented it back to them.

[41] After the intervention of another family friend, Mr Dennis attended Woodbine on May 23, 2004 and told the security officers there that he wanted to self-exclude. He was given the self-exclusion form, read it, initialed each paragraph and signed it. In his affidavit he stated:

> My comprehension of the document was poor as I was so distraught and embarrassed by the whole experience but I did understand I had agreed to be refused entry into the [OLGC] gambling venues because I had provided my particulars and been photographed.

[42] He stated further that he had understood that, having signed the self-exclusion form, he would subsequently be denied entry to all OLGC gambling sites and that OLGC had the right to do this and to remove him if he entered any of their facilities. This occurred only once on the many occasions – commencing just one week after he signed the form - on which he returned to gamble over the next three years.

[43] It will serve no useful purpose to set out in any detail the subsequent events that occurred. It is enough to say that, despite the self-exclusion form he had signed, Mr Dennis continued to visit Woodbine and to incur serious gambling losses; the physical and mental health of his wife and children suffered severely; family relations became strained; one family member attempted suicide; and the mortgagee foreclosed. Mr Dennis had been terminated from his latest employment when he had gambled and lost money needed to pay an amount he owed to one of his employer’s customers. Finally, after yet another purchase and a subsequent default on the mortgage, the family were forced to sell their home in November 2007 and are at present in rental accomodation.

[44] By October 6, 2007 Mr Dennis continued to have the urge to gamble but had no money to enable him to indulge it. He consulted his family doctor in October, 2007 and was referred to the Centre for Addiction and Mental Health. He was diagnosed as suffering from problem gambling and received treatment.

[45] In cross-examination on November 27, 2009, Mr Dennis stated that he considered that the treatment had been successful, that he has stopped gambling and has not been to a casino since September, 2007.

(b) Ms Zubin Phirose Noble

[46] Ms Noble has a degree in chemistry from an Indian university. She has been employed by American Express since 1997 and at present is an executive travel consultant with that company. In her affidavit she confirmed the accuracy of the contents of the affidavit sworn by Mr Dennis.

(c) Ms Lori Stolz

[47] Ms Stoltz is one of the lawyers for the plaintiffs and has been actively involved in preparing the case for certification. In her affidavits sworn for the purpose of the motion, Ms Stoltz provided an overview of the case, and of the personal gambling history of Mr Dennis, as well as a considerable amount of background information relating particularly to the nature and prevalence of problem gambling, the operations and activities of OLGC and its administration of the self-excluded program, the announced commitment of the government of Ontario, and OLGC, to responsible gambling and a number of criticisms that have been made by various individuals and entities of the effectiveness of the commitment and that of the self-exclusion program.

[48] Ms Stoltz also refers to nine individual actions that have been brought against OLGC by self-excluded persons and reportedly settled for an average payment of $167,000 per claim. She refers to four other pending actions. She offers the opinion based on discussions with self-excluded persons that a combination of the expense involved and the potential stigma attached to problem gambling would act as a significant deterrent to the commencement of similar actions by other self-excluded persons.

(d) Dr Kevin Harrigan

[49] Dr Harrigan is a research associate professor at the University of Waterloo where he teaches and conducts research in computer-game design including electronic gambling games such as slot-machines and video poker games. His particular research interest at present is in understanding whether and, if so how, structural characteristics of slot machines may explain why so many people develop an addiction to them.

[50] From 1999 through June 2008, Dr Harrigan visited OLGC gambling venues on approximately 240 occasions on which he concentrated on slot-machine gambling. He played the games, observed others playing them, and spoke to the technicians servicing them. In his affidavit and in his answers in cross-examination he described in considerable detail:

(a) the different varieties of machines that are selected by OLGC from those approved by the Alcohol and Gaming Commission pursuant to the *Gaming Control Act*;

(b) the standards applied by the testing laboratory of the Commission;

(c) different design elements - or structural characteristics - that, in his opinion, "conceal and misrepresent" how the games work and do not, for example, reveal the significantly different probabilities of winning on various versions of the same game;

(d) how the machines are programmed to indicate various types of "near miss" that, in fact, have not occurred in any meaningful sense, and to treat as wins what are actually losses reflecting paybacks less than the amounts wagered; and

(e) how it is a distinguishing characteristics of slot-machine gambling that the player wins very frequently while as a matter of statistical probability, his bankroll steadily declines as the wins are reinvested.

[51] Dr Harrigan also refers to the substantial revenues generated by OLGC's slot machines - $3 billion in 2002 - 2003. He expresses the opinion that slot machines are highly addictive and that the misleading features of the machines contribute to the addiction. He does not provide specific grounds for these opinions other than a reference to an article co-authored by Dr Robert Williams in which it is estimated that approximately 60 per cent of slot-machine revenue - about $1.6 billion annually - is derived from problem gamblers.

[52] Dr Harrigan’s cross-examination was largely informative for his opinion that statistical sampling can be used to estimate the likely reactions of problem gamblers to the different features of slot machines that he had characterized as potentially misleading and addictive.

(e) Dr Robert Williams

[53] Dr Williams has a Ph.D. degree in psychology from McMaster University. From 1985 to 1996 he worked as a regional psychologist in the Department of Family Services in Manitoba. From 1996 he was a clinical psychologist at the addiction centre of a hospital in Calgary. In 2001, he accepted a faculty position at the School of Health Science at the University of Lethbridge, specialising in gambling research. He is at present a full professor in the addiction counselling program at the University of Lethbridge as well as a co-ordinator for the Alberta Gaming Research Unit. In the report exhibited to his affidavit he stated that he is the best-funded gambling researcher in the world and is recognized as one of the world's leading authorities in the prevention of problem gambling and related subjects.

[54] Dr Williams described "problem gambling" as a term that refers to someone whose gambling has resulted in significant harm for that person or for other people in the person's immediate social network. These harms can be in any of the following areas: finances, psychological health, physical health, legal problems, work/school problems, and family relationship problems.

[55] The appropriateness of the reliance and attempted use by plaintiffs' counsel of Dr Williams classification of some individuals as severe or pathological problem gamblers – as distinguished from recreational, low-risk and moderate problem gamblers – is, in my judgment, very much in issue on this motion.

[56] After referring to the biological, environmental and psychological factors that contribute to a person being a problem gambler, and the adverse consequences that can ensue for the individuals, their families and the community, Dr Williams discussed the features and history of self-exclusion programs, the extent of their use in Canada, the losses suffered by problem gamblers who have not self-excluded, and available alternative models and measures for dealing with problem gambling.

[57] Among the opinions Dr Williams provided on the basis of his research and experience were that, apart from biological and psychological factors, contributing factors to the likelihood that a person would engage in problem gambling include:

(i) the availability of electronic gambling machines which because of high rates of reinforcement, illusion of control and deceptive "near miss" features, are the most addictive forms of gambling;

(ii) erroneous beliefs about how gambling works, and the probabilities of success;

(iii) the ready availability of funds through nearby automated cash machines; and

(iv) ineffectual self-exclusion programs.

[58] Dr Williams referred to the very low percentage of problem gamblers who enter into self-exclusion programs in Canada - approximately 10,000 out of 269,000 in Ontario, or 3.7 %. He estimates that 87 % of these would be severe problem gamblers and 10 % moderate problem gamblers. He attributes the low percentage of signatories, in part, to deficiencies in the promotion of the programs. He contrasts the position with that in the Netherlands where, he states, patrons with a high attendance rate are approached by staff of the facilities to ascertain whether they would wish to self-exclude.

[59] Dr Williams estimated that the losses of the 10,428 problem gamblers who subsequently entered into self-exclusion arrangements with OLGC would have amounted to approximately $80 million annually.

[60] Finally, Dr Williams identifies what he considers to be weaknesses in OLGC's self-exclusion measures and possible alternative methods for dealing with problem gambling. He considers one of the main problems to be the physical impossibility for security personnel to memorise and recognize more than 10,000 excluded individuals from the photographs they have on file. He compares this unfavourably with the system used in most European countries where

the names of self-excluded persons are recorded in an electronic database and all patrons have to provide identification before entering a gambling facility.

[61] A second problem identified by Dr Williams was that the OLGC program is reactive in that, unlike the measures used in the Netherlands, no help is provided unless and until the problem gambler requests self-exclusion.

[62] Further initiatives by OLGC to combat the harm caused by problem gambling were then discussed by Dr Williams and found to be inadequate in various respects. He concludes that the reluctance of OLGC to implement effective initiatives stems, in part, from

> an unrealistic desire to implement effective prevention policies that do not inconvenience non-problem gamblers or reduce revenues. Unfortunately, the reality is that effective problem gambling prevention is only likely to occur with some level of inconvenience to non-problem gamblers and necessarily involves a loss of revenue because of the significant contribution problem gambling makes to overall gambling revenue (36 per cent in Ontario).

[63] In his supplementary affidavit, Dr Williams made detailed comments on the contents of the affidavits sworn by the defendant's deponents, Mr Pellazzari and Dr Howard Shaffer. The tone of the comments is argumentative and, although they may have some relevance to the merits of the litigation, I did not find them to be of great assistance for the purpose of this motion.

[64] I note, however, that Dr Williams takes issue with what he considers to be Mr Pellizzari's characterization of self-inclusion as an unenforceable customer-based initiative – a “self-help” tool - with no onus on the venue. Dr Williams states in the report exhibited to his supplementary affidavit:

> Gamblers enroll in self-exclusion for the purpose of obtaining external constraints on their behaviour following their repeated inability to voluntarily control it themselves, and the serious negative consequences that are being caused by the continued involvement. If they believed or understood that the venue would not or could not actually exclude them, most would not sign up in the first place.

[65] An analogy drawn by Dr Howard Shaffer – whose affidavit was delivered on behalf of OLGC - between self-exclusion and a "no-suicide agreement" was similarly rejected by Dr Williams, as was Mr Pellizzari's claim, that Ontario is a leading jurisdiction in the prevention and treatment of problem gambling. Dr Williams would prefer to give this accolade to the State of Utah which has not legalised gambling, or the 13 U.S. States that have not licenced casinos or slot machines.

[66] In cross-examination, Dr Williams stated that, in his opinion, a significant majority of self-excluded persons would have come back to an OLGC facility. He said that, although the only way to be certain would be to interview each excluded gambler, there were reasonable projections that could be made based firmly on estimates derived from the behaviour of persons

addicted to alcohol, drugs and tobacco. He indicated that he had not interviewed any class members other than Mr Dennis and that he had very little information about their long-term behaviour.

[67] In an article published in 2002, and referred to in his report, Dr Williams and his co-author described self-exclusion as a fairly new procedure and one that was not yet widely known. They referred to the absence of research on how best to optimise its effectiveness. In the same article, the authors describe the enforcement of self-exclusion to be a universal problem.

[68] The reliability of Dr Williams' methodology and conclusions for determining losses even on an aggregate basis were challenged by OLGC's counsel. It is not the function of the court on this procedural motion to choose between the competing opinions of expert witnesses. In connection with parts of Dr Williams' evidence there are, however, questions relating to the utility of his opinions for purposes of certification even if their correctness is assumed.

2. Evidence in Response to the Motion.

[69] In addition to the affidavit of Mr Pellizzari, OLGC delivered an affidavit of Dr Howard J. Shaffer of Harvard Medical School.

(a) Mr Paul Pellizzari

[70] As well as the background information I have already mentioned, Mr Pellizzari's affidavit deals with the history of the introduction of casino gambling in Ontario, and the evolution of OLGC's efforts to promote responsible gambling through self exclusion and by other means. He refers to the reasons for relying solely on photo identification and the existence of an "open access" policy that precluded the use of other methods of recognising self-excluded patrons at OLGC's venues. The adequacy of these reasons was disputed by Dr Williams, as well as the other two matters I mentioned in my summary of his evidence.

[71] In the course of his cross-examination, Mr Pellizzari denied that it was the intended objective of the self-exclusion problem to keep the signatories out of the gambling venues. The objective he said was to give those people an opportunity to make a commitment to themselves to stay away from gambling.

[72] In response to a question from plaintiffs' counsel, Mr Pellizzari stated that, to his knowledge, civil actions were the only available methods of resolving the plaintiff's claims. He did not accept the suggestion that OLGC had never adopted what he had described as an "open access" policy that had the effect of limiting the measures that could be taken to identify self-excluded patrons.

[73] Plaintiffs' counsel were critical of the choice of Mr Pellizzari to swear an affidavit in response to the motion as he did not commence his employment with OLGC until 2007 and had no personal knowledge of events in the class period from December 1, 1999 to February 10, 2005. However – apart from the few matters I have mentioned - it is not my understanding that

there are disputed statements of fact in his affidavit that bear heavily on the resolution of the issues on this motion.

(b) Dr Howard Shaffer

[74] Dr Shaffer is a clinical and research psychologist specialising in the area of addictive behaviours in general, and gambling-related disorders in particular. He is an associate professor at Harvard Medical School and the Director of the Division on Addictions at one of that school's teaching affiliates.

[75] A large part of Dr Shaffer's report concerned biological, psychological and other factors with which problem gambling is associated. He emphasised that pathological gamblers are not a homogenous group because of the varying interactive factors that may influence the likelihood of developing, sustaining or recovering from the disorder.

[76] Dr Shaffer considered that self-exclusion programs were best considered to be "an accommodation: that is to assist the gambler to regain control of his behaviour".

[77] Dr Shaffer referred to studies in other jurisdictions that suggest that approximately 50% of self-excluded persons continue to gamble in other venues. The reliability of this estimate was challenged by Dr Williams.

CERTIFICATION

[78] For a proceeding to be certified under the CPA each of the conditions in section 5(1) must be satisfied. A certification motion is intended to be a procedural stage of the action, or application, and evidence that is relevant only to the merits of the claims advanced on behalf of the plaintiffs, or the class, is not admissible. The plaintiff must, however, adduce evidence that provides some basis in fact for each of the statutory requirements in section 5(1)(b) through (e): *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158 at para 25. Where, as is often the case, this can only be done by evidence that also bears on the merits, the minimum evidential standard - and not the ordinary civil standard of a balance of probabilities - is to be applied for the purpose of determining whether a particular requirement is satisfied.

[79] Evidence is not admissible in respect of the condition in section 5 (1) (a). This is to be determined solely on the basis of the plaintiffs' pleading.

[80] Before dealing with each of the statutory requirements in turn, it is important to note one important limitation on the claims advanced by the plaintiffs. Although there are paragraphs of the statement of claim that might suggest otherwise, plaintiffs' counsel insisted that the claims advanced in the proceeding are limited to those of persons who signed the particular self - exclusion forms between December 1, 1999 and February 10, 2005. It is no part of their case that OLGC owes duties of care, or other legal duties, to problem gamblers as such. In consequence, this wider question is not in issue in the proceeding.

1. Section 5(1)(a): Disclosure of a Cause of Action

[81] Section 5 (1) (a) requires that the statement of claim must disclose a cause of action. For this purpose, the plaintiffs must plead the material facts that would constitute a cause of action and the question whether this has been done is to be determined in accordance with the "plain and obvious" test commonly associated with the decision of the Supreme Court of Canada in *Hunt* v. *Carey Canada Ltd.*, [1990] 2 S.C.R. 959. This test, which is applied also in motions to strike a pleading under rule 21.01(1)(b), requires the pleading to be read generously without regard to infelicities of drafting and on the assumption that all allegations of facts - other than those that are manifestly incapable of proof - will be established at trial.

[82] It has also been held on numerous occasions in the Court of Appeal that, where there is uncertainty as to the existence of a cause of action in an area of the law that is in the course of development, the cause of action should be accepted so that it will be dealt with at trial on the basis of a full evidential record: *Anderson* v. *Wilson* (1999), 44 O.R. (3d) 673 (C.A.), at page 679; *Nash* v. *Ontario* (1995), 27 O.R. (3d) 1 (C.A.), at para 11; *R. D. Belanger and Associates Ltd*. v. *Stadium Corporation of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.), at page 782. Consistently with this approach, the novelty of a cause of action will not, by itself, lead to its rejection: *Hunt* at para 33.

[83] In addition, I note the following passage from the judgment of the court in *Hunt* which I believe has particular relevance to the facts of this case:

> I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure, that the law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society. (para 52).

[84] There is one other aspect of the inquiry required by section 5(1)(a) that is of particular importance in this case. It is fundamental to the requirements for certification that the relevant question under section 5(1)(a) is whether the pleading discloses a cause of action of the plaintiffs. It is not whether causes of action of the other class members have been pleaded. The existence of claims of such other class members is to be considered under the requirements in section 5(1)(b) and 5(1)(c) that there be a class whose members share issues in common. For these purposes, evidence is required to satisfy the minimum burden of "some basis in fact" referrd to in *Hollick* at para 25.

[85] It follows that, although in this case the statement of claim contained allegations of fact relating to all class members - and, in particular, an allegation that they wore all problem gamblers in the sense defined in the pleading - this has no bearing on the issues arising under any of the paragraphs of section 5 (1) except those that arise under section 5 (1) (a) in respect of the plaintiffs. As far as the other class members are concerned, the rule that it must be presumed that allegations of fact in the pleading will be proven at trial has no application.

[86] Although it follows that the proposed causes of action in this case must be accepted unless it is plain and obvious that they cannot, in law, arise from the facts pleaded, recent decisions of the Court of Appeal have underlined that there are limits to the latitude that is to be allowed.

[87] In this case, the causes of action on which the plaintiffs rely are negligence, occupiers' liability, and, in the alternative, breach of contract or a disgorgement of revenues. In the submission of counsel for OLGC, none of these causes of action is sufficiently disclosed in the plaintiffs' pleading.

[88] The interpretation and effect of the terms of the self-exclusion form are relevant to each of the causes of action asserted in the statement of claim. As they are central to the claims for breach of contract - and as the existence of the other causes of action may be affected by OLGC’s attempt in the form to exclude its liability - it will be convenient to consider first whether breaches of contract have been sufficiently disclosed in the pleading.

(a) Breach of Contract

(i) Was there a contract?

[89] It is pleaded that OLGC’s self exclusion policy provided for binding contracts under which OLGC committed to use its best efforts to deny customers entry to all OLGC's gambling venues, and to detect and remove them if entry was effected. It is pleaded further that OLGC breached these contractual obligations and a duty to exercise good faith, and that these were fundamental breaches from which serious and permanent injuries and losses were suffered by the plaintiffs and the class members.

[90] The allegation that OLGC's self-exclusion policy entitled problem gamblers to enter into binding contracts by signing self-exclusion forms is a legal conclusion and, as such, is not governed by the rule that assumes pleaded allegations of fact will be proven at trial. The documents containing the self-exclusion policy are incorporated in the pleading. They do not, in my opinion, provide any support for the plea that self-exclusion is effected by way of a binding contract other than through the terms of the self-exclusion forms that they include.

[91] Although the forms do not contain any explicit promise by OLGC to do anything, it is, I believe, sufficiently clear that in the first paragraph it is committing to provide a service that will consist of using its best efforts to deny entry to the customer. In return, the customers impliedly waived all rights or licences they might otherwise have to enter into the gambling premises without complying with the conditions for reinstatement in the second paragraph, they accepted that the form and the photographs could be shared with other OLGC venues, and they provided the releases set out in the third paragraph of the form. On the basis of the terms of the form alone - and, subject to the effect, if any, of the disclaimer of responsibility at the end of the first paragraph, and the releases in the third paragraph - I do not consider that it is plain and obvious

that there was no contract between the parties. The consideration moving from the self-excluded person was weak but it was not, in my opinion, non-existent or illusory.

[92] I am also of the opinion that sufficient allegations of OLGC's breaches of the contractual duty to exercise its best efforts have been pleaded. Essentially, the allegations are that OLGC knew that its system of memory-based enforcement was entirely inadequate to identify self-excluded gamblers who sought re-entry; that it knew that the system was ineffective; that it did not attempt to remedy the deficiencies; and that it failed to implement more effective measures reasonably available to it.

[93] For the purpose of certification, OLGC's counsel did not challenge the proposition that, in providing the customer with the opportunity to self-exclude, OLGC assumed an obligation to use its best efforts that could be contractually binding. Rather, it was their submission that any such contractual obligation was negated by the disclaimer of responsibility and the releases.

(ii) Exclusion of OLGC's liability

[94] The self-exclusion forms contained two provisions that are evidently intended to deny, or limit, OLGC's responsibility in the event that the signatory subsequently sought and obtained entry to the gaming venues. The first consists of the repudiation of responsibility "in the event that you fail to comply with the ban, which you voluntary requested". While the generality of these words might be understood to extend the disclaimer to all cases in which entry was obtained – and irrespective of whether OLGC performed its obligation to use its best efforts - they might also be read more narrowly as addressing only non-compliance by the gambler and not a breach of OLGC's obligation. In this respect, there is a contrast with the form introduced immediately after the end of the class period. This contains an express acknowledgement and agreement that OLGC and the private operators "have no responsibility or obligation to keep or prevent me from entering an OLGC facility, to remove me if I enter, or to stop me from gambling". There is an even greater contrast with the exclusion of liability clause referred to in *Calvert* v. *William Hill Credit Ltd.*, 2008 EWHC 454, aff'd [2009] 2 W.L.R. 1055 which will be considered later in these reasons.

[95] I agree with counsel for the plaintiffs that, viewed in isolation, the disclaimer at the end of the first paragraph of the form does not satisfy the requirements set out in *Falcon Lumber Ltd. v. Canada Wood Speciality Co*. (1978), 28 O.R. (2d) 345 (H.C.) at page 350 in a passage approved by the Court of Appeal in *Braun Estate* v. *Zenair Ltd.*, [1998] O. J. No. 4841 at para 10:

> First, the clause must be strictly construed and the burden is on the party relying upon the exemption to prove that the particular loss caused to the other party was clearly within the scope of the exemption clause. Secondly, if there is an ambiguity in the meaning of the exempting clause and it is capable of more than one reasonable construction, then the rule of contra proferentem will apply and the exemption clause will be construed against the maker. Thirdly, the defendant

> will not generally be exempt from liability for the negligence of its servants unless express words are used or unless the only possible head of damage for which the defendant may be liable on the contract, lies in negligence. Here the words of the exempting clause do not expressly exclude negligence and, while the clause speaks of the defendant as not being "responsible for damages", it does not refer to the cause or origin of such damages.

[96] The ambiguity - or at least, the lack of clarity - in the disclaimer at the end of the first paragraph of the form is, in my opinion, remedied when it is read in conjunction with the releases in the third paragraph. These expressly extend to "any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with the voluntary ban". When the form is read in its entirety, I believe it sufficiently discloses an intention of OLGC to offer an accommodation, or service, to assist the problem gambler while excluding any legal responsibility that might otherwise arise if it failed to do so.

[97] It would not, in my opinion, be reasonable to interpret the form as intended to exclude OLGC's liability only in the event that it had used its best efforts to deny entry to the problem gambler. To do so would, in my opinion, be to give the language of the document the kind of strained and artificial interpretation condemned by Wilson J. in *Hunter Engineering Co*. v. *Syncrude Canada Ltd*., [1989] 1 S.C.R. 426 at para 150.

[98] It is not pleaded that Mr Dennis did not read the form before he appears to have initialled each paragraph and signed it. Nor is it pleaded that he did not understand any of its terms. In my opinion, the plain meaning of the release is that any claims and causes of action against OLGC for failing to exercise its best efforts were intended to be included in the reference to "any and all liability, causes of action, claims and demands, whatsoever". Contrary to the submission of plaintiffs' counsel, and notwithstanding the *contra proferentem* principle, it would not in my judgment be a reasonable interpretation to limit these words to claims arising out of attempts by OLGC'S staff to apprehend self-excluded persons and to escort them off the premises. As, in my opinion, the meaning of the disclaimer and release is clear, this is not a situation in which extrinsic evidence is required for the interpretation of the language of the form:

> ... it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face.: *Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129 at para 55.

[99] There has, in any event, been no suggestion that the context is other than that indicated in the pleading. The purpose of self-exclusion - and the context in which the form was signed - was to assist a person concerned to avoid further gambling losses. It would, in my opinion, be an artificial, and not a reasonable, interpretation to conclude that – depite the stated intntion to release "any and all liability" - the only liability that OLGC intended to exclude was that relating to harm suffered by the self-excluded person by being dealt with as a trespasser. I am in agreement with counsel for OLGC that the disclaimer of responsibility and the releases should be

interpreted as excluding liability for gambling losses incurred as a result of a failure “to comply with this voluntary ban”, whatever the cause of action.

[100] Even on the basis of the above interpretation of the form, plaintiffs' counsel submitted that the release would not necessarily be given effect as the failure of OLGC to exercise its best efforts was a fundamental breach that, on the facts pleaded, would make it unconscionable to permit it to rely on the disclaimer and release. In view of the possible implications of the decision in *Tercon Contractors Ltd*. v. *British Columbia (Transportation and Highways)* 2010 SCC 4; [2010] S.C.J. No. 4, which was released shortly after the hearing of this motion, I invited, and received, further submissions from counsel in respect of this aspect of OLGC's entitlement to rely on the disclaimer and release.

[101] Although the court in *Tercon* was divided on the interpretation to be given to the particular exclusionary language in that case, it was unanimous in holding that the concept of fundamental breach should no longer have any role to play when a plaintiff seeks to escape the effect of an exclusion of liability clause to which he had previously agreed. The correct - and now the authoritative - approach endorsed by the nine members of the court was summarized by Binnie J. as follows:

> The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462) This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the court may undertake a third inquiry, namely whether the court should nevertheless refuse to enforce a valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs a very strong public interest in the enforcement of contracts. (paras 122-123)

[102] On the first question - that of interpretation - I have already given my opinion that the words of the form reveal an intention to exclude OLGC from liability even in circumstances where, as here, it is alleged to have failed to perform its contractual obligation to exercise its best efforts.

[103] On the question of unconscionability at the time the form was executed, this was not a case in which there was inequality of bargaining power in the traditional sense in which that term has been used in the authorities. The concept of bargaining contemplates an exchange of

benefits. The context was not one in which OLGC was attempting to obtain any benefit for itself, other than, perhaps, the public image of a responsible government agency.

[104] OLGC was providing a service in an attempt to assist the plaintiff and the class members to obtain control over their propensity to gamble to excess. OLGC would obtain no financial benefit from self exclusion and there was no reliance by the plaintiff and other class members on OLGC's undertaking to exercise its best efforts except to the extent that it may have had some influence on the decision to sign the self-exclusion form. They did not rely on the undertaking in the sense that it otherwise influenced their future conduct; they did not act upon it to their detriment. On the contrary, they sought to circumvent and frustrate its performance.

[105] But for one remaining consideration, there was, in my opinion nothing unconscionable in OLGC stipulating that it would undertake to exercise its best efforts so as to assist the plaintiff and class members but only on the condition that in no circumstances would it be liable for any gambling losses incurred by them in the event that, for any reason, self-exclusion failed to achieve its intended affect.

[106] The plaintiffs have, however, pleaded that at all material times OLGC knew that its system for enforcing self-exclusion was inadequate and would be ineffective. If this is proven, and it is found that the self-exclusion program was mere window-dressing – a public relations exercise - and did not reflect a genuine commitment to the program and to responsible gambling, it could, in my judgment, be found to have been unconscionable at the outset to offer such a program to vulnerable problem gamblers seeking assistance and, *a fortiori*, to attempt to exclude OLGC’s liability when so doing. It could well, in my opinion, be found to extend beyond extraordinary and unacceptable cynicism for a Crown agency – that had repeatedly and publicly proclaimed its commitment to responsible gambling - to respond to pleas for help from vulnerable problem gamblers by providing an undertaking that it had no intention to fulfill.

[107] The third inquiry required by *Tercon* would be relevant only if unconscionability at the outset is not established.

[108] In his discussion of the role of public policy in determining when a court should exercise its “narrow” public policy jurisdiction to give relief against an exclusion of liability clause, Binnie J. referred to cases where criminal or fraudulent conduct on behalf of the defendant would justify a finding that reliance on an exclusion clause should be considered to be an abuse that should not be countenanced by the court. He emphasised, moreover, that less egregious conduct could require the same conclusion where, for example,

> ... the defendant was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

> ... where this type of conduct is reflected in the breach of contract, all the circumstances should be examined very carefully by the court. Such misconduct may disable a defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. (paras 119-120)

[109] The enquiry into public policy considerations in this case will require a consideration of a number of factors identified in the statement of claim. These include the conflict between OLGC's interest in maximising profits from its gambling operations and its avowed commitment to responsible gambling; alleged breaches of the *Criminal Code* in its operations; and its alleged breaches of the *Business Practices Act*, R.S.O. 1990, c. B.18. Countervailing considerations may arise from the status of OLGC as an agency of the Crown and the extent to which policy decisions of the kind relevant at the second stage of the *Anns* test for the existence of a duty of care are not open to challenge. In my opinion the interplay between these considerations requires a full evidential record before a reasoned determination can be made.

[110] It follows that, in my judgment, neither the unconscionability nor the public policy enquiries required by the analysis in *Tercon* can be satisfactorily performed solely on the basis of the pleading in this case. In consequence, it is not plain and obvious that OLGC is absolved from liability by the disclaimer and the releases in the form.

(b) Negligence

[111] I note at the outset of the consideration of the claim in negligence that although, on the basis of *Central Trust Co.* v. *Rafuse* [1986] 2 S.C.R. 147 – as explained in *B.G. Checo International Ltd.*, v. *British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 – words excluding contractual liability may be effective also to preclude liability in tort, the possibility of concurrent liability in contract and tort would not otherwise be excluded.

[112] As a matter of interpretation, and while a duty to exercise “best efforts” has been held to require a higher standard than a duty to exercise reasonable care – see, for example, *OEB International Ltd., v. Leyden*, [!995] O.J. No. 3571 (G.D.), citing *Atmospheric Diving Services Inc. v. International Standard Suits Inc.*, [1994] B.C.J. No. 493 (C.A.) – the words excluding OLGC’s liability in the self-exclusion form are, in my opinion, as applicable to liability for negligence as they are to that arising from a breach of the contractual obligation.

[113] Although self-exclusion programs have been adopted in other provinces, counsel were not able to cite any Canadian decisions that involved claims in negligence against gambling operators who failed to prevent self-excluded problem gamblers from continuing to gamble. In view of the novelty, as well as the difficulty, of the questions that arise, it will be useful to consider first an English decision - *Calvert* v. *William Hill Credit Ltd.*, 2008 EWHC 454 (Ch.), aff’d [2009] 2 W.L.R. 1065 (C.A.) - in which on somewhat similar, though not identical, facts, such claims were considered at length and in depth.

[114] *Calvert* was made after a trial and was affirmed on appeal. At first instance, Briggs J. began by noting that it was the first time an English court had been required to consider the question:

> ... whether a bookmaker who has, at the customer's request, undertaken to prohibit the customer from gambling for a specified period, owes the customer a duty to take reasonable care to enforce that prohibition, so as to protect the problem gambler from the risk of gambling losses during the specified period.

[115] A recognition of such a duty would, he stated, involve a "journey to the outermost reaches of the law of negligence to the realm of the truly exceptional".

[116] In *Calvert*, the plaintiff claimed damages of approximately £1.8 million for the negligence of the defendant bookmaker. This amount represented gambling losses incurred by Mr Calvert throughout the period between August 5 and December 2, 2006 in respect of telephone bets placed with the defendant after Mr Calvert had on two occasions asked to have his telephone account closed permanently.

[117] At the times of Mr Calvert's requests, the defendant had adopted a self-exclusion policy and procedures which required, among other things, the completion of a self-exclusion agreement. These procedures - which should have prevented Mr Calvert from reopening his account - were not complied with by the defendant's employees and he was permitted to continue to place bets by telephone with the defendant.

[118] Mr Calvert claimed - and at the trial was found - to be a problem gambler. He claimed that, as such, he was owed a broad duty of care under which bookmakers were required to protect problem gamblers from the consequences of their compulsive disorder. In the alternative, he claimed that on the basis of the assurances given by the defendant's employees when he requested that his account be closed, the defendant had assumed a sufficient responsibility to exclude him from telephone gambling with the defendant to give rise to a duty to implement the exclusion.

[119] At first instance, Briggs J. rejected the existence of the broader duty of care that was said to be owed by bookmakers to all problem gamblers. As, in this case, plaintiffs' counsel disclaimed reliance on any such broader duty, it is not necessary to consider the reasons given by Briggs J. on this point. (They are to be found at paras 163-174 of the judgment)

[120] At paras 175-187 of the judgment, Briggs J. considered whether the defendant owed a duty of care to Mr Calvert on the basis of the assurances he had received from the defendant's employees that his account would be closed. In finding in favour of such a duty, the learned judge attributed weight to the following considerations:

> (a) problem gambling is a recognised psychiatric disorder from which the plaintiff was known by the defendant to be suffering. In consequence, both

financial and psychiatric harm from a failure of the self-exclusion processes was reasonably foreseeable;

(b) there was no risk of indeterminate liability to an indeterminate class in the context of a specific request for self-exclusion by a particular problem gambler;

(c) there was no reason why it should be considered to be unfair that a bookmaker who has undertaken, albeit without consideration, to exclude a problem gambler at his request, without making any disclaimer of liability, should incur a duty of care. A bookmaker does not become a gambler's loss insurer as the only obligation is to take reasonable care;

(d) there was no basis for a floodgates concern on the facts; and

(e) the exchanges between the plaintiff and one of the defendant's employees were sufficient to indicate a voluntary assumption of responsibility by the defendant and a duty to take care to implement the exclusion. The fact that these exchanges had all the *indicia* of a contract save for consideration:

> ... means that the assumption of responsibility arising from their exchange can properly be extrapolated from the main line of authorities stemming from the *Hedley Byrne* case, even though the present case is more about a request for assistance by a person whose vulnerability gives rise to a degree of dependence, than a mere request for advice and information, the accuracy or truth of which is then to be relied upon. In the present case, the nature of the reliance was of course different, but it is in my judgment inherent in a request for self-exclusion that the problem gambler is seeking to rely upon the bookmaker's assistance in maintaining his diminished control of his gambling, which, without that assistance, he fears will fail him.

[121] Although the analysis of the duty of care in *Calvert* does not follow the *Anns* structure as approved by the Supreme Court of Canada in cases such as *Cooper v. Hobart,* [2001] 3 S.C.R. 537*, Edwards v. Law Society of Upper Canada,*[2001] 3 S.C.R. 562 *, and Childs v. Desormeaux,* [2006] 1 s.C.R. 643, the strands in the reasoning of Briggs J. are all, in my opinion, relevant in applying the principles in those cases. Reasonable foreseeability, proximity and policy considerations - including those relating to indeterminate liability - were all considered in *Calvert*.

[122] In particular, I note that the relevance of assumptions of responsibility to questions of proximity was recognised by McLachlin J. as she then was, in *Canadian National Railway* v. *Norsk Pacific Steamship Co.* [1992] 1 S.C.R. 1021 at paras 256 – 258 as well as in the more

recent decision of the Court of Appeal in *Sauer* v. *Canada*, [2007] O.J. No. 2443. Similarly, as in *Calvert*, the relevance of the existence of a contractual relationship to the issue of proximity has been accepted: *Rafuse* at para 49.

[123] Having accepted the existence of a duty of care, Briggs J. had no difficulty in concluding that it had been breached by the defendant's continued acceptance of telephone betting by Mr Calvert. Nevertheless, he dismissed the action on the ground that the breach did not cause Mr Calvert's financial ruin.

[124] The learned judge was satisfied on a balance of probabilities that Mr Calvert's gambling disorder was so compulsive, and the other gambling opportunities available to him so extensive, that the defendant's negligence contributed to his losses only by accelerating what would probably have occurred in any event. His conclusion was as follows:

> It follows that the claimant's case entirely falls upon the ground that William Hill's negligence merely affected the manner in which, and in particular the rate at which, the pre-existing pathological gambling disorder caused the financial and social ruin and the psychological harm which form the basis of his claim, without in any definable way increasing the aggregate amount of either form of harm.

[125] The analysis of causation issues that led to that conclusion is, I believe, sufficiently indicated by the following passages (at paras 195 - 197):

> It follows of course that the particular losses which the claimant suffered between August and December 2006 by reason of his telephone betting would not have been sustained, but for William Hill's negligence. But that by no means concludes the causation analysis. Although in a sense the claimant's case is that he was harmed by the aggregate outcome of the particular debts which he placed with William Hill, his complaint is that by failing to exclude him from gambling, William Hill caused his financial and social rule and an aggravation of his gambling disorder.
>
> However unsatisfactory this may be to philosophers and legal academics, causation is, as applied by the courts, ultimately a matter of common sense: [authorities omitted]. 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. ....
>
> 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.

[126] On an appeal from the decision of Briggs J., the court found it necessary to deal only with the question of causation. The appeal was dismissed on the following ground:

> Mr Calvert's claim does not fail, in our judgment, because his continued gambling with William Hill was his own deliberate act breaking the chain of causation; but because the scope of William Hill's duty of care did not extend to prevent him from gambling, and because the quantification of his loss cannot ignore other gambling losses which Mr Calvert would probably have sustained but for their breach of duty. The law not only prescribes the appropriate causal connection, but also the scope of the duty and the scope of the loss which the causal connection links.

[127] Finally, in connection with *Calvert* I note that the agreement that should have been – but was not – completed contained a release in the following terms:

> The customer releases all companies from within the William Hill Group, their officers and employees from any liability or claims whatsoever in the event that *they* fail to comply with this voluntary exclusion. (emphasis added)

[128] In his discussion of causation, Briggs J. accepted that, "subject to any question as to its reasonableness" the release would have protected the defendant from any subsequent acts of negligence. (at para 192)

[129] In the submission of plaintiffs' counsel, the facts pleaded in this case are sufficient to satisfy the plain and obvious test with respect to each of the constituent elements of the tort of negligence. Specifically, it was submitted that:

> (a) a finding that OLGC had reasonable foresight that Mr Dennis would suffer financial and physical harm if OLGC did not take reasonable steps to exclude him from its premises was sufficiently supported by the allegations that OLGC knew that Mr Dennis was a problem gambler and that memory-based enforcement would be inadequate to prevent him from continuing to gamble and to obtain entry for that purpose;
>
> (b) a finding of a relationship of proximity between Mr Dennis and OLGC could be made on the basis of OLGC's repeated representations of its commitment to assist problem gamblers through self-exclusion and otherwise, and, more particularly, through the specific steps it undertook

to implement the self-exclusion program for Mr Dennis and the other class members individually;

(c) no facts have been pleaded from which the court could infer that there are residual considerations of policy that would negative the existence of a duty of care at the second stage of the *Anns* enquiry. There is no risk of indeterminate liability and the self-exclusion measures adopted by OLGC were operational measures undertaken to support and implement its policies related to problem gambling and those of the Government of Ontario;

(d) the claim that OLGC breached its duty to exercise reasonable care is sufficiently supported by the pleaded allegations of the total ineffectiveness of the system of memory-based enforcement and the existence of other more effective alternatives that could have been employed by OLGC; and

(e) on the facts as pleaded, it is not plain and obvious that the gambling and other financial losses suffered by Mr Dennis after he executed the self-exclusion form - and the physical harm he suffered by the progression of his recognised psychiatric disorder - were not the direct and foreseeable consequences of OLGC's breaches of duty.

[130] In their submissions, plaintiffs' counsel placed the emphasis quite properly on the contents of the pleading. Given the novelty and difficulty of the issues relating to the duty of care in (b) and (c) above – and the evident sufficiency of the pleading to support the submissions on the other elements of the cause of action - my initial inclination was that the pleading should be accepted and the plaintiffs permitted to have the issues relating to the duty of care tried on the basis of the evidence without being "driven from the judgment seat" at this preliminary stage of the proceeding. It is, however, necessary to be mindful of a number of recent decisions of the Court of Appeal in which the latitude allowed by the reasoning in *Hunt* has not prevented claims against the Crown from being rejected on the basis of the pleadings alone.

[131] The authoritative approach to the application of the *Anns* test was described by McLachlin C.J. and Major J. in *Edwards* at para 9, as follows:

> At the first stage of the Anns test, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The focus at this stage is on factors arising from the relationship between the plaintiff and defendant, including broad considerations of policy. The starting point for this analysis is to determine whether there are analogous categories of cases in which proximity has previously been recognised. If no such cases exist, the question then becomes whether a new duty of care should be recognised in the circumstances. Mere foreseeability is not enough to

> establish a *prima facie* duty of care. The plaintiff must also show proximity - that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances.

[132] In the submission of plaintiffs' counsel, the existence of OLGC's duty of care in this case falls within the established category recognised by the same learned judges in *Cooper* at para 36, as cases where "governmental authorities who had undertaken a policy of road maintenance had been held to a duty of care to execute the maintenance in a non-negligent manner".

[133] This established category was relied on by Sachs J. in *Edmonds* v. *Le Plante* (unreported, March 15, 2005) where, in the course of a trial the learned judge ruled that OLGC owed a duty of care when implementing an announced policy of ensuring that no unfair advantage was obtained over other purchasers of lottery tickets when retail vendors purchased tickets for themselves.

[134] The same category was expanded further incrementally in *Heaslip Estate* v. *Mansfield Ski Club Inc.* (2009), 96 O.R. (3d) 401 (C.A.) when proximity was found to exist between a provincial air ambulance operator and an individual whose death was allegedly caused by the operator's failure to give his needs priority over other patients in accordance with its declared policy. Sharpe J. stated (at para 21):

> The appellant's alleged acts of negligence in responding to a specific request for urgently required medical services and the negligent failure to comply with an established government policy, both of which are alleged to have caused harm to Patrick Heaslip. I agree with the appellants that the alleged facts in this case support the existence of a duty of care akin to the one identified in *Attis*, at para 66: "once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk." ... the duty of care alleged here belongs within the established category of a public authority's negligent failure to act in accordance with an established policy where it is reasonably foreseeable that failure to do so well cause physical harm to the plaintiff: see, e.g., *Just v. British Columbia*, ...

[135] Arguments by analogy from one factual situation to another are always vulnerable to challenge on the ground that there are material distinctions between the two sets of facts. The analogy here is, I believe, sufficiently close. OLGC adopted a policy under which it would use its best efforts to exclude problem gamblers who requested its assistance. On the analogy of *Edmonds* and *Heaslip*, this policy gave rise to a duty of care that would be breached by a failure to implement it.

[136] Independently of the established category - and on the basis that this is a novel situation - I believe the facts as pleaded would be sufficient to support a finding of proximity in accordance with the principles stated by the Supreme Court of Canada in the cases I have mentioned and

others. I accept the submission of plaintiffs' counsel that a relationship of proximity between OLGC and Mr Dennis could be found to have arisen from the former's repeated representations of its commitment to assist problem gamblers and the specific steps it undertook to implement the self-exclusion program for his benefit.

[137] The plaintiffs' position is that the subsequent gambling losses of Mr Dennis would not have occurred but for OLGC's failure to take reasonable steps to exclude him from the gaming venues. While, as in *Calvert*, this might well be in issue on the basis of a full evidential record at a trial, the material facts from which a finding of causation could be made have, in my judgment, been sufficiently pleaded. In *Drady* v. *Canada* (2008), 300 D.L.R. (4th) 443 the Court of Appeal was insistent that, by itself, the creation of a risk will not give rise to relationship of proximity. It was not, I think, denied that it may be very relevant to causation which, in turn, can be one of the factors on which a finding of proximity is based.

[138] In *Norsk Pacific Steamship Co.* McLachlin J. stated (at para 49):

> In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity, such as the relationship between the parties, close physical propinquity, assumed or imposed obligations and close causal connection.

[139] In *Cooper* the same learned judge described the relevant factors as those

> ... that allow us to evaluate the closeness of the relationship between the plaintiff and defendant and to determine whether it is just and fair having regard to their relationship to impose a duty of care upon the defendant (at para 34)

[140] Although in *Childs* the court was dealing with a case of a private social event, the Chief Justice made a number of comments that, I believe, point in the direction of proximity on the pleaded facts of this case. In particular, two situations were identified in which duties to take positive steps to control the behaviour of others may arise. The first was:

> ... where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls ... (para 35)

[141] The other situation:

> ... concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large. 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. (para 37)

[142] Two other passages in the judgment were relied on by plaintiffs' counsel as relevant by analogy to the issue of proximity in this case:

> .. 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. The appellants argue that there is "nothing inherently special" about profit-making in the law of negligence. In the case of alcohol sales, however, it is clear that profit-making is relevant. 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. The costs of over-consumption are borne by the drinker him or herself, taxpayers who collectively pay for the added strain on related public services and sometimes tragically, third parties who may come into contact with intoxicated patrons on the roads. Yet the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public. (para 22)

[143] In the submission of plaintiffs' counsel the words of the Chief Justice can be applied equally to the operators of gambling venues such as OLGC.

[144] Finally, I note in connection with the question of risk the Chief Justice's statement in paragraph 38:

> Running through all these situations is the defendant's material implication in the creation of risk or his or her control of the risk to which others have been invited. The operator of a dangerous sporting competition creates or enhances the risk by inviting and enabling people to participate in an inherently risky activity. It follows that the operator must take special steps to protect against the risk materialising.... The public provider of services undertakes a public service, and must do so in a way that appropriately minimises associated risks to the public.

[145] In this connection, I note the pleading that, by making gambling facilities available to the public, OLGC created an environment that was inherently dangerous and would inevitably stimulate latent problem gambling propensities in vulnerable individuals.

[146] On one side of the line is the decision in *Drady* in which the importance of risk creation was downplayed and the absence of allegations that the plaintiff had relied on representations made by Crown servants concerning the safety of particular medical implants was considered to be decisive against a finding of proximity. *Sauer v. Canada*, [2009] O.J. No. 402 (C.A.) is on the other side of the line. There, proximity was found to have been sufficiently pleaded by the

Crown's "public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed".

[147] As I have previously indicated, there is no allegation that OLGC's commitment to provide a "best efforts" service induced Mr Dennis to change his position in a manner that caused his losses. The allegation that he relied on OLGC's repeated public representations that it was a responsible operator of the gambling venues, and its undertaking to use its best efforts, appears to me to be much closer to the "assumption of responsibility" approach in *Sauer* than the representation and reliance analysis in *Drady*. Mr Dennis relied on the undertaking of OLGC to exercise its best efforts to exclude him only in the sense that it gave him cause for optimism that he might be able to defeat his compulsive urge to gamble, and may have influenced him to sign the self-exclusion form. “Expectations” would appear to be a more appropriate expression than “reliance” in the sense used in the law relating, for example, to negligent misrepresentations. In *Childs*, at para 40, “reasonable reliance” was explicitly equated with a “reasonable expectation”. This, I believe, is also consistent with the reasoning of Briggs J. in *Calvert*.

[148] In disputing the submission that proximity existed between OLGC and Mr Dennis, defendant's counsel referred to the concept of “personal autonomy” and the general principle that there is no duty to take care to safeguard another person from self-inflicted harm. The importance of this principle was affirmed by McLachlin C.J in *Childs* and considerable weight was attributed to it in a number of Australian cases which were referred to in *Calvert* and which, like *Calvert*, were decided after a trial. In one unreported case, however, it appears that an Australian court declined to strike a pleading of negligence by an alleged problem gambler.

[149] Here, it was pleaded that all of the class members were problem gamblers. It was also pleaded that OLGC knew, or ought to have known, that problem gambling is a progressive behavioural disorder in which an individual develops a psychologically uncontrollable preoccupation and urge to gamble. Given the additional pleading of OLGC’s public recognition of the existence and severity of the problem, I do not believe that the notion of personal autonomy should be decisive against the existence of proximity for the purposes of section 5(1)(a). As I will indicate, I believe it may have considerable relevance to the enquiry into commonality in which the plaintiffs are not assisted by – and cannot rely on - the pleading that all of the class members were vulnerable problem gamblers in the sense pleaded.

[150] In connection with the possibility of policy considerations that might displace the *prima facie* duty of care established at the first stage of the *Anns* enquiry, plaintiffs’ counsel referred to the documentation containing statements of OLGC’s self-exclusion policies and procedures. The statements were adopted by OLGC at various times, and without substantial changes, throughout the class period. As I have indicated, they are expressly incorporated in the pleading.

[151] The statements are described as proactive steps taken to complement and support the Government's initiatives in connection with responsible and problem gambling. They contain detailed procedures for implementing the self-exclusion policy and include the forms for self-exclusion and reinstatement.

[152] Plaintiffs' counsel submitted that the forms and the statements of procedures are on their face, and in substance, simply means of implementing government policy and not themselves statements of policy that would be relevant at the second stage of the *Anns* test. In consequence, the challenge to the adequacy of the self-exclusion process does not, in their submission, conflict with government policy that would exclude the existence of a duty of care.

[153] The distinction between policy and operational decisions can be difficult to draw. I am not prepared to find at this stage that plaintiffs' counsel were plainly and obviously wrong. OLGC is an agency of the Crown and was here endeavouring to conduct a commercial enterprise in a manner consistent with government policy. The extent to which its efforts to do this should be characterised as policy decisions of a Crown agent, or purely operational efforts in implementing government policy, is problematic.

[154] The basis of the Crown's immunity for policy decisions was described by McLachlin C.J in *Cooper* at para 38 as follows:

> ... it is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy.

[155] In *Sauer* it was held at first instance and in the Court of Appeal that issues relating to residual policy considerations should be tried. At paras 45 and 63, Goudge J.A. stated in connection with claims against a manufacturer, Ridley, and against the Crown, respectively:

> 45. It is to be remembered that at this point we have only the statement of claim. Ridley has not filed a defence. In *Childs*, *supra*, the court said that at the second stage, the defendant (in this case Ridley) has the evidentiary burden of showing countervailing policy considerations sufficient to negate the *prima facie* duty of care. It is for this reason that this court has said that it should be circumspect in determining so early in an action that residual policy considerations make it plain and obvious that there is no duty of care.
>
> 63. Moving to the second stage of the analysis, Sauer pleads that these were not policy decisions but were operational, and that this therefore negates Canada's major reason for saying that Sauer's complaints cannot survive this stage of the duty of care analysis. Given that the evidentiary onus at this stage is on Canada, and that at this early point in the proceedings it has brought forward nothing, I agree.

[156] It is not claimed in this case that OLGC did not follow the specific procedures it had formally adopted with respect to the provision of the self-exclusion forms and the manner in

which their execution was to be supervised. The complaint is essentially that, by failing to live up to the commitment it had made with the self-excluded persons, OLGC was not acting consistently with the policies those procedures were intended to implement. In consequence, even if the procedures prescribed by OLGC are to be considered to be policy decisions, this would not, in my opinion, necessarily confer immunity on the decision to adopt an allegedly inadequate method of enforcement of the best efforts commitment: *cf*., *Heaslip* where a duty of care was found to have arisen by reason of a Crown instrumentality's failure to adhere to its policy decisions. In these circumstances I am not prepared to find that, on the basis of the pleading alone, it is plain and obvious that the adoption of a memory-based enforcement procedure is to be considered as a policy decision that insulates OLGC as a Crown agent from civil law liability.

[157] Finally, for essentially the same reasons as those provided by Briggs J. in *Calvert*, I agree with plaintiffs' counsel that recognition of the existence of a duty of care would not raise the spectre of indeterminate liability in this case.

(c) Occupiers' Liability

[158] Relevant provisions of the *Occupiers' Liability Act*, R.S.O. 1990, c. O. 2 ("OLA") are as follows:

> 1. In this Act, "occupier" includes,
>
> (a) a person who is in physical possession of premises, or
>
> (b) a person who has responsibility for and control over the condition of premises or the activities there carried on, or control over persons allowed to enter the premises, despite the fact that there is more than one occupier of the same premises;
>
> 2. Subject to section 9, this Act applies in place of the rules of common law that determine the care that the occupier of premises at common law is required to show for the purpose of determining the occupier's liability at law in respect of dangers to persons entering on the premises or the property brought on the premises by those persons.
>
> 3. (1). An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.
>
> (2) the duty of care provided for in subsection (1) applies whether the danger is caused by the condition of the premises or by an activity carried on the premises.

> (3) the duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty.
>
> 4. (1) The duty of care provided for in subsection 3 (1) does not apply in respect of risks willingly assumed by the person who went on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his or her property and to not act with reckless disregard of the presence of the person or his or her property. ...

[159] It is not part of the plaintiffs' case that OLGC, as an occupier, of the gambling venues had a duty to identify problem gamblers and prevent them from gambling. As applied to Mr Dennis, the claim of occupiers' liability is based on a breach of a duty under section 3(1) of the OLA with respect to a specific person who was, to the knowledge of OLG, a problem gambler. Whether or not the alleged failure of OLGC to exercise its best efforts to exclude Mr Dennis from the premises was actionable as a breach of contract, or of a common law duty of care, section 3(1) might well, in my opinion, impose a duty to take reasonable steps to prevent him from gambling in the event that he obtained access to the gaming premises.

[160] It is pleaded that the system of memory-based recognition was entirely inadequate for this purpose and that Mr Dennis and the other class members suffered significant consequential injuries and losses including "the worsening of their illnesses as problem gamblers" as well as financial and other losses.

[161] Given the pleading that problem gambling is a progressive behavioural disorder in which an individual develops a psychologically uncontrollable predisposition to gambling when exposed to available gambling facilities - and OLGC's knowledge of this - I am not satisfied that the plea that the gambling was a dangerous activity within the meaning of section 3(2) of the Act is plainly and obviously incapable of proof in respect of Mr Dennis.

[162] Similarly, in view of this pleading, I do not believe it is plain and obvious that Mr Dennis must be found to have “willingly” accepted the risks attached to being on the premises and participating in the activities there within the meaning of section 4(1) of the statute.

[163] Counsel for the defendants submitted that reliance on occupiers' liability was misconceived in that the OLA permits recovery for physical injuries only. As authority for this submission, counsel cited the decision of Ground J. in *Geo S. Kelson and Co.* v. *Ellis Don Construction Ltd.*, [1998] O.J. No. 1172 (G.D.), in which it was held that the OLA did not extend to claims for economic loss. Referring, in particular, to section 4 (1) of the Act, the learned judge commented that the OLA seems to contemplate that only physical injury to persons and property will be actionable (at para 55).

[164] Here, however, Mr Dennis claimed damages for the deleterious consequences that the availability of gambling facilities had on his psychologically uncontrollable progressive behavioural disorder. In *Odhavji Estate* v. *Woodhouse*, [2003] 3 S.C.R. 263 at para 41, Iacobucci J. stated:

> It is well established to that compensation for psychiatric damages is available in instances in which the plaintiff suffered from a visible and provable illness" or "recognisable physical or psychopathological harm".

[165] In *Mustapha v. Culligan of Canada Ltd*, [2008] 2 S.C.R. 114 at para 8, the court stated:

> Generally, a plaintiff who suffers personal injury will be found to have suffered damage. Damage for purposes of this inquiry includes psychological injury. The distinction between physical and mental injury is elusive and arguably artificial in the context of tort.

[166] There is, in my opinion, sufficient in the pleading to distinguish this case from *Kelson* and to permit a finding that a cause of action of Mr Dennis for occupiers' liability has been sufficiently disclosed in the pleading.

(d) Waiver of Tort

[167] In the alternative to the claims for compensatory damages in negligence and occupiers' liability, the plaintiffs claim an order for the payment of revenues or net profits obtained by OLGC from problem gamblers.

[168] To the extent that the claim extends to revenues or profits from gambling by persons who are not within the class, it is obviously untenable.

[169] If the claim is restricted to the amounts received from Mr Dennis and the other class members, I believe that, in conformity with the reasoning in *Hunt*, the decision of the Divisional Court in *Serhan Estate* v. *Johnson & Johnson*, [2006] O.J. No. 2421 (Div. Ct.) - and the subsequent decision to deny leave to appeal in *Heward* v. *Eli Lilly*, [2008] O.J. No. 2610 (Div. Ct.) – it is not plain and obvious that Mr Dennis has no cause of action to recover the amounts of his subsequent gambling losses.

[170] In argument, Mr Morse referred briefly to the possibility of a restitutionary accounting of revenues or profits based on OLGC's alleged breaches of the *Criminal Code*. The argument was not developed and, as pleaded, the claim was based on the torts of negligence and occupiers' liability. As such it would be equally dependent on the ambit and effectiveness of OLGC's attempt to exclude its liability in the self-exclusion forms.

[171] It is unfortunate that the law on the availability of what are sometimes referred to as restitutionary damages, or an account of profits, should remain in a state of uncertainty. In this regard, I am not aware of any significant developments in this jurisdiction since the decision in *Serhans* - although I understand that there are pending proceedings in which the issue is likely to be tried.

[172] The availability of an account of profits gained from non-proprietary torts was considered by the Court of Appeal in England in *Devenish Nutrition Limited* v. *Sanofi-Aventis SA (France)*, [2009] 3 All E.R. 27 as a preliminary issue to be decided, for the most part, on the pleading. The court was unanimous in holding that it was bound by its previous decision in *Stoke-on-Trent City Council* v. *W & J Wass Ltd*., [1988] 3 All E.R. 394 to find that the remedy was not available in cases of non-proprietary torts.

[173] In *Serhan*, at first instance, I had referred to criticisms of the decision in *Stoke-on-Trent* and its possible inconsistency with other cases in England and in this jurisdiction. I concluded that the law was sufficiently uncertain to make it inappropriate to follow the decision and to reject the availability of the remedy for the purposes of section 5(1)(a) of the CPA on the facts of *Serhan*.

[174] While, ordinarily, a decision of the English Court of Appeal to follow *Stoke-on-Trent* might be considered to justify reopening the issue of the availability of the remedy of a disgorgement and account of profits for non-proprietary torts, I do not think the reasoning in *Devenish* would justify such an approach.

[175] Quite apart from the fact that I am bound to follow the decisions of the Divisional Court, the analysis in each of the three judgments delivered in *Devenish* falls short of settling the issues of law that will have to be decided in this jurisdiction.

[176] The most extensive analysis was contained in the reasons of Arden L.J. who considered at some length the implications of the decision of the House of Lords in *Blake v. Attorney-General*, [2001] A.C. 268 and stated:

> I conclude on this sub-issue that it is consistent with Blake for restitutionary awards to be available in the case of a non-proprietary tort but that the decision of this court in [*Stoke-on-Trent*] precludes this court from reaching that conclusion.

[177] The learned judge expanded on that statement in paragraph 58 as follows:

> As I read the speech of Lord Nicholls, the making of a restitutionary award does not depend on whether a property right has been infringed or whether the award is compensatory for loss or not. Rather, it depends on whether damages alone would be a sufficient remedy in the eyes of the law for the wrong that has occurred. If this is right, and moreover an account of profits can be ordered for a breach of contract that, as in Blake, does not involve interference with a proprietary right, it would not, in my judgment, be inconsistent with the reasoning of Lord Nicholls in

> the passages cited above if it were also available in the case of non-proprietary tort. This point can be supported by pointing to the fact that a claim for damages under Lord Cairns' Act may also be available for a non-proprietary tort. Lord Nicholls' speech does not suggest an account of profits is not available on a like basis in the case of a non-proprietary tort. He draws on cases in which damages are assessed by reference to the benefit obtained by the wrongdoer. This can occur in cases in tort. However, this is not a line of thought which I can pursue if as the respondents admit this court has held that such an award can only be made in the case of a proprietary tort in a manner binding on this court on this appeal.

[178] Tuckey L.J. was similarly of the opinion that the reasoning in *Blake* suggests that "an account of profits could be ordered for non-proprietary torts" but that the court was bound by its earlier decision in *Stoke-on-Trent*. He stated:

> I agree with what Arden L.J. says at para 57 that Blake suggests that an account of profits could be ordered for non-proprietary torts. But for the reason she gives in para 75 I do not think it can be said that [*Stoke-on-Trent*] which was not cited in *Blake* has necessarily been overruled by it. It can stand with *Blake*. Non-proprietary torts do still therefore fall to be considered as an exception to the general principles articulated by Lord Nicholls in Blake unless and until [*Stoke-on-Trent*] is overruled.

[179] The third judge, Longmoore L.J, was not prepared to regard *Stoke-on-Trent* as closing the range of cases in which an account would be ordered but considered that, generally, it should be available only in connection with property, or fiduciary claims and other exceptional cases such as *Blake*. At para 149 he quoted the following passage from the dissenting speech of Lord Hobhouse in *Blake* at page 299:

> ... if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced in to our commercial law the consequences will be very far-reaching and disruptive. I do not believe that such is the intention of your Lordships but if others are tempted to try to extend the decision of the present exceptional case to commercial situations so as to introduce restitution rights beyond those presently recognised by the law of restitution, such a step will require very careful consideration before it is acceded to.

[180] Each of the learned judges in *Devenish* accepted that, in accordance with the reasoning in *Blake*, an account might be available in cases where the plaintiff had suffered no loss and each was of the opinion that the remedy should be limited to cases where compensatory damages would not be adequate. In considering the question of adequacy the court had recourse to evidence - an avenue that is not open to me for the purposes of section 5(1)(a). The assessment of compensatory damages in this case may well give rise to some difficulty. In *Devenish*, Arden L.J. left open the possibility that evidential difficulties in proving losses might have some

bearing on the question whether an account of profits should be ordered instead of compensatory damages (para 106).

[181] Two final points on *Devenish*: Arden L.J. (at para 39) referred to the existence of flexibility in determining the percentage of profits to be awarded; and the same learned judge categorically rejected the notion that an election to claim an account of profits rather than compensatory damages can be deferred until after judgment. (para 104)

[182] I have referred to *Devenish* at some length because the analysis is helpful in focusing attention on the issues that have emerged in this comparatively undeveloped area of the law of remedies that is particularly encountered in class proceedings and remains at present in a state of limbo in this jurisdiction. As a decision based ultimately on *stare decisis* as applied to decisions of the English Court of Appeal, it would not in my opinion justify a reconsideration of the earlier decisions of this court, even if it were open for me to do this. In consequence, in this case, as in the others, I am satisfied that the important issues raised on the claim for an account of revenues or profits - under the rubric of "waiver of tort" or otherwise - should be left to be dealt with at trial after the evidential record is complete.

2. Section 5 (1) (b): The Existence of a Class

[183] In paragraph 5 (a) of the statement of claim the primary class that the plaintiffs seek to represent is defined as:

> Dennis, and all other residents of Ontario and the United States who signed the [self-exclusion form] at any time in the period from December 1, 1999 to February 10, 2005.

[184] It was not disputed by OLGC's counsel that the definition employs objective criteria. Given the claims advanced on behalf of the class, I am satisfied that it is not objectionably under-inclusive. The question whether it is over-inclusive involves an enquiry into the existence of a rational connection between the class definition and the common issues. This, in turn, will require a consideration of the commonality of the latter and will be considered in connection with the requirement in section 5(1)(c).

[185] The inclusion of residents of the United States is presumably based on the accessibility of OLGC's gaming venues – such as the original casino in Windsor - to such persons. At this stage OLGC has not been able to determine the number of them who would be included in the estimated 10,428 persons who signed self-exclusion forms during the class period.

[186] The derivative class of family law members is, as such, defined satisfactorily.

3. Section 5(1)(c) - Common Issues

[187] The plaintiffs have provided a list of 15 proposed common issues. These must advance the proceeding significantly if it is to be acceptable for certification. The most important for this purpose are:

(a) whether the self-exclusion forms are binding contracts that required OLGC to take reasonable care to deny entry to OLGC's facilities to the primary class members, and to detect and remove any who gained entry;

(b) whether OLGC had a duty in tort to take such reasonable care;

(c) whether OLGC breached either, or each, of the duties in 1. or 2. or its duty under the OLA;

(d) whether damages sustained by class members as a consequence of any breaches of the above duties can be determined on an aggregate basis in whole, or in part; and

(e) whether OLGC can be required to account for gross revenues, or net income, derived from class members as a consequence of any such breaches of duty.

[188] In addition, there are issues relating to punitive damages, limitations, damages sustained by family members of the derivative class, prejudgment and post-judgment interest, and the expenses of administration and of the resolution of individual issues.

[189] I believe that serious flaws in the plaintiffs' case for certification are exposed when consideration is given to the requirements of commonality, and that of a rational connection between the class definition and the proposed common issues. For the reasons that follow, I am satisfied that:

1. the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;

2. vulnerability is not a condition of class membership. As defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;

3. the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and

4. in consequence, the requirement of a class in section 5(1)(b) and of common issues in section 5(1)(c) of the CPA are not satisfied and certification must be denied.

[190] A mass of evidence has been filed on the nature and prevalence of problem gambling. The vulnerability of self-excluded persons - the class members – as problem gamblers is the general theme of the claims pleaded on their behalf. It is, therefore, striking – and I believe it is significant - that the class definition does not require the members to be identified as problem gamblers in any sense, or to any particular degree. Similarly, the proposed common issues do not refer to problem gambling and do not, in their terms, treat its nature and extent as factors to be considered by the trial judge. The class definition as originally defined in the statement of claim restricted the class to "compulsive" gamblers. This class criterion was deleted when the pleading was amended because, I presume, it would not have permitted class members to be identified with sufficient objectivity and certainty.

[191] In my opinion, the vulnerability of class members is essential to the validity of their claims. Persons who were not problem gamblers would have no tenable claims and there could be no question of certifying the proceeding in respect of such persons. The evidence is that the disorder is progressive and that there is a range of its severity. There is nothing in the class definition or the formulation of the common issues to confine the claims asserted to members of the class who were vulnerable to any particular degree, if at all, and, in my judgment, the class definition is to that extent objectionably over-inclusive, and the proposed common issues lack commonality. While it can no doubt be presumed that most self-excluded persons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

[192] If Mr Dennis, or any of the other class members, had advanced the same claims in individual actions, OLGC would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of section 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of OLGC to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.

[193] In *Hollick*, at para 21, it was accepted that over-inclusive classes can be permitted where the class "could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues". I do not understand this principle to permit an over-inclusive class to be accepted if the reason why it could not be drafted more narrowly is the inability to provide a limiting class criterion that will establish the rational link with the proposed common issues on which commonality depends. In such a situation, instead of common issues determinable on a class-wide basis, there will be individual issues affecting liability to each member of a diverse group. In my judgment, that is the case here.

[194] The problem is not avoided by the pleading that each of the class members was a problem gambler in the sense that he or she suffered from psychologically uncontrollable preoccupations, urges and compulsions to engage in gambling. For the purpose of the inter-related requirements of an acceptable class definition and acceptable common issues, evidence is required and the pleading will not be determinative on the basis of an assumption that its allegations of fact will be proven at trial. Evidence of a rational connection between the class definition and the common issues - and, which amounts to the same thing, the existence of commonality - must provide some basis in fact for an inference that each of the class members has a claim of which a resolution of the proposed common issues will be a substantial ingredient.

[195] Plaintiffs' counsel attempted to remedy the absence of anything in the class definition that would confine it to a discrete determinative group of vulnerable gamblers by reference to the evidence of Dr Williams and his reliance on a classification of gamblers into: (a) pathological problem gamblers with an uncontrollable propensity to gamble; (b) moderate problem gamblers where there is no significant loss of control; (c) at-risk, or low-risk, gamblers where there is a pattern of gambling behaviour that puts the gambler at risk of becoming a moderate or pathological gambler; and (d) recreational or non-problem gamblers.

[196] The category of pathological gamblers corresponds broadly with the description of problem gamblers in the pleading and the identification of the class members as pathological gamblers is, in my opinion, fundamental to the case for certification presented by plaintiffs' counsel. As Dr William stated in cross-examination:

> We're not talking about moderate gamblers we're talking about pathological gamblers where loss of control is an inherent feature and so it is likely these people will tempt fate and sooner rather than later.

[197] It is not disputed that empirical and statistical research into the behaviour of self--excluded problem gamblers is still in its infancy. Based on his work, and a limited number of studies conducted by others, Dr Williams estimated that approximately 87% of the class members would have been pathological gamblers.

[198] Apart from the criticisms that were levelled by OLGC 's counsel at the objectivity of Dr Williams and the adequacy of his methodology, there are a number of reasons why reliance on this evidence is insufficient to convert the class, as defined, into a sufficiently determinative group of vulnerable persons.

[199] In the first place, Dr Williams concedes - and Dr Shaffer agrees - that not all class members are pathological gamblers.

[200] Second, within the category of problem gamblers there are degrees of severity and moments of clarity are experienced.

[201] For the purpose of the classification, Dr Williams cited the *Diagnostic and Statistical Manual for Mental Disorders* - 4th edition (DSM-IV) of the American Psychiatric Association (1994). This is referred to by Dr Shaffer in a footnote to his report as follows:

> There is ambivalence about the construct validity of pathological gambling as a unique disorder. Example, there is a cautionary note in the DSM-IV (American psychiatric Association, 1994) suggesting possible limits to the relevance and exculpatory value of this diagnostic category: "... inclusion here, *for clinical and research purposes*, of a diagnostic category such as Pathological Gambling ... does not imply that the condition meets legal or other nonmedical criteria for what constitutes mental disease, mental disorder, or mental disability. *The clinical and scientific considerations involved in categorisations of these conditions as mental disorders may not be wholly relevant to legal judgments, for example, that take into account such issues as individual responsibility, disability, determination and competency*. (emphasis added)

[202] The test set out in DSM-IV for determining whether a person is a pathological gambler was discussed in *Calvert* and a case in the Federal Court of Australia: *Foroughi* v. *Star City Proprietary Ltd*, [2007] F.C.A. 1503.

[203] As described by Briggs J. in *Calvert*, a list of 10 factual criteria is provided. When three or more are satisfied, a patient is characterised as a problem gambler. If five or more are met, he or she is described as a "probable pathological gambler". This would be the case if, for example, the patient:

1. needs to gamble with increasing amounts of money in order to achieve the desired excitement;

2. is restless or irritable when trying to cut down or stop gambling;

3. gambles as a way of escaping from problems or of relieving a dysphoric mood (eg feelings of helplessness, guilt, anxiety, depression);

4. after losing money gambling, often returns another day to get even;

5. lies to family members, therapists, or others to conceal extent of involvement with gambling.

[204] In *Foroughi*, although the expert witnesses were in agreement that the plaintiff satisfied five of the conditions to be a probable pathological gambler, the court accepted the opinion of one of the experts that such persons can exercise control and limit or cease gambling if they choose to do so.

[205] In *Calvert*, Briggs J. referred to the DSM-IV classification when reaching a conclusion about the degree of the compulsion to gamble suffered by Mr Calvert at various times. After a

detailed consideration of Mr Calvert's gambling history and hearing expert witnesses on each side, it was held that he was a severe pathological gambler by the end of the relevant period after he had requested sel-exclusion, but not necessarily earlier. Despite this use of the DSM-IV classification, the learned judge stated that Mr Calvert's

> ... undoubted continued responsibility ... in relation to his gambling would, however severe the loss of control during the second half of 2006, have led to a very large reduction of any award on the grounds of contributory negligence.

[206] The Court of Appeal agreed with the learned judge on this point stating:

> ... we agree with the judge that a deduction would fall to be made for contributory negligence as a result of Mr Calvert continuing to gamble despite periods of clarity which he would have had, and when he could have taken steps, not limited to self-exclusion, to try to deal with his habit. In that connection, it was not until some time in the last quarter of 2006 that he became a severe pathological gambler who had lost control of his gambling, rather than merely suffering an impairment of control:.... Moreover, on 10th October 2006, in a moment of clarity, he was expressly offered the opportunity to self-exclude and he declined to take it.

[207] In the opinion of the Court of Appeal, damages would have been reduced by 30 per cent for contributory negligence if a finding of liability had been made.

[208] I find nothing in these authorities from other jurisdictions to suggest that it would be fair to the defendant - or that the court could properly be asked - to decide, for example, whether a duty of care was owed to all class members, and whether they "willingly" accepted the risks when entering OLGC's gambling venues on the basis of an assumption that a person who satisfied five or more of the diagnostic criteria in DSM-IV would have a materially uncontrollable disorder.

[209] As the caveat at the end of the passage I have quoted from DSM-IV suggests, the 10 *indicia* may be useful for research and clinical studies but there is, in my opinion, nothing in the evidence to suggest that, even if the class was limited to those self-excluded persons who satisfied five of the diagnostic criteria, the proposed common issues could fairly be answered on a class-wide basis without individual enquiries into the personal circumstances and gambling history of each class member.

[210] Moreover, as, in this case, the experts were in agreement that not all self-excluded persons - the class members - were problem gamblers in the sense on which plaintiffs' counsel relied, counsel were forced to justify reliance on their vulnerability by reference to the statistical evidence of Dr Williams that 87% of self-excluded persons would be pathological gamblers at, I believe, the times that they executed the self-exclusion forms. As I have mentioned when summarizing his evidence, he was also of the opinion that a significant number of self-excluded

persons would have returned to an OLGC gambling facility, and that reasonable projections of their numbers could be derived from studies of the behaviour of persons addicted to alcohol, drugs and tobacco. He also stated with some confidence that, by referring to a published index, it would take him no more than five minutes to place any particular gambler in the appropriate one of his four categories without regard, presumably, to any issues of credibility.

[211] The statistical evidence based on sampling to which Dr Williams referred – and on which plaintiffs' counsel relied - is not, in my opinion, admissible for the purpose of determining commonality of the five of the proposed common issues on which OLGC's liability depends. To ascribe commonality to such issues on the basis of such evidence would be to assert that OLGC's liability, or elements affecting its liability – other than proof of damages or the amount of a monetary award - can be determined on the basis of statistical probability.

[212] Commonality presupposes that the same, or some of the same, material issues of fact or law that will assist in establishing the claims of each class member – and the liability of OLGC - can be decided at the trial of the proposed common issues. The CPA does not permit the requirement of commonality to be avoided by a statistical estimate that 87% of the class members were pathological problem gamblers, or that there was an 87% statistical probability that each class member was a pathological problem gambler. It is a procedural statute and it does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims.

[213] Accordingly, it has been held that the statute does not permit the liability of a defendant, or the entitlement of a class member, to be determined on the basis of statistical probabilities based on the behaviour of other persons: *Chadha* v. *Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. CT.); *2038724 Ontario Ltd*. v. *Quiznos Canada Restaurant Corp.*, [2008] O.J. No. 833 (S.C.J.); rev'd on other grounds, [2009] O.J. No. 1874 (Div. Ct.); *Risorto* v. *State Farm Mutual Automobile Insurance Co.*, [2007] O.J. No. 876 (S.C.J.); *Parsons* v. *Canadian Red Cross Society* (2000), 51 O.R. (3d) 261 (S.C.J.)

[214] In *Chadha*, Somers J. stated (at paras 72-73):

> The submission of the respondents ... that "the Class Proceedings Act was expressly designed by the Ontario Legislature to provide procedures which will allow the claims of victims of a price-fixing conspiracy to be assessed on an aggregate basis" is erroneous. It is not the entitlement to damages which can be assessed on an aggregate basis under the Act, but rather the quantum of damages which can be so assessed.
>
> Nor can statistical evidence adduced by experts resolve the problems of proof present in this case. First, s. 23 of the Act deals with the admissibility and use of statistical evidence "[F]or the purposes of determining issues relating to the amount or distribution of a monetary award under this Act. ..." It does not render

> otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability.

[215] Although made in the context of the administration of a plan under a settlement, the following comments of Winkler J. in *Parsons*, (at para 32) are equally applicable to the issues relating to commonality in this case:

> In my view, to paraphrase the words of Gonthier J. in Lawson, while probabilities may be part of a determination of causation, the determination of entitlement should not be moved from the concrete to the probabilistic plane. In these circumstances given the overwhelming effect of expert evidence of this nature, especially where the evidence to the contrary is sparse or non-existent, the use of probability calculations will likely become the sole determining factor used by the Administrator. Moreover, this inherent danger in the use of expert evidence has been recognized by the Supreme Court of Canada in *R.D.* v. *D. (D.)*, 2000 SCC p. 43. There, Major J., writing for the majority, expressed concern that the use of expert evidence often leads to the decision-maker simply "attorning" to the expert's opinion. In this case, the danger of the misuse of the probability calculations is manifest.

[216] I note that recent decisions of this court have denied that, where proof of loss is a necessary element of liability, it must be shown that damages could be proven on a class-wide basis without regard to the aggregate assessment provisions of 24 of the CPA assisted by an application of generally accepted statistical principles referred to in section 23. This I understand was the view of the majority of the Divisional Court in *2038724 Ontario Ltd. v. Quiznos Ltd Canada Restaurant Corporation,* [2009] O.J. No. 1874 at paras 46 - 66 - with Swinton J., in dissent, at paras 186 – 187, agreeing with the motion judge that all the constituent elements of liability must be proven on a class-wide basis. The passage I have quoted from the reasoning of Somers J. in *Chadha* was arguably to the same effect as that of Swinton J. I have been told that an appeal in *Quiznos* is pending.

[217] The possible conflict in the decisions was considered by Rady J. in *Irving Paper Ltd v. Atofina Chemicals Inc*., [2009] O.J. No. 4021 (S.C.J.) where the learned judge referred to statements in the reasons of Rosenberg J.A. and Winkler C.J.O. in *Markson v. MBNA Canada Bank,* [2007] O.J. No. 1684 (C.A.) and *Cassano v. Toronto-Dominion Bank,* [2007] O.J. No. 4406 (C.A.) to the effect that only a finding of "potential liability" is required before an aggregate assessment of damages can be made. She concluded (at para 118):

> I am of the view that *Markson* and *Cassano* signal a different approach to be taken to certification whether it be in breach of contract or other types of cases. Justice Rosenberg spoke of the need to establish "potential liability" before resort to the aggregate provisions could be had. That being so, it seems to me that the plaintiffs here need only prove potential liability - in other words, that the defendants acted unlawfully. This would trigger the aggregate assessment

> provisions. Further, *Markson* establishes that not every class member need have suffered a loss and so it is not necessary to show damages on a class-wide basis.

[218] The learned judge did not suggest that proof that the defendants acted unlawfully could be avoided by use of the aggregation provisions or by way of statistical evidence, and I do not believe her decision or those of the Divisional Court and the Court of Appeal, alter the necessity to show that other elements of liability that are framed as common issues - such as the existence of a duty of care or a breach of duty - must have commonality. For this purpose, it must be shown that they can be proven on a class-wide basis without regard to the aggregate assessment provisions of section 24. These provisions apply only where:

> ... no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; ...

[219] I am of the same opinion where the question is whether proven losses were caused by the defendant's conduct – as distinguished from whether there were any losses compensable in damages. There may, perhaps, be a question whether the approach of the Court of Appeal in *Calvert* is consistent with that in *Athey v. Leonati*, [1996] 3 S.C.R. 458 and *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333. However, despite the liberalising effect of the recent decisions, I do not believe we have yet reached the stage where "potential liability" will be established - and the aggregation provisions can be used - without the need to determine individual issues relating to causation of identified losses. Nor do I believe that the "potential liability" of OLGC can fairly and properly be established on the basis of statistical probabilities relating to individual issues other than those referred to by Rady J. in *Irving Paper*, or to other common issues of material fact or law on which liability depends.

[220] I am also of the opinion that, even if the result is that *Chadha* has been overtaken by the subsequent decisions to the effect that sections 23 and 24 can be applied even where proof of harm or losses is a precondition for liability, the prohibition on the use of statistical evidence fo satisfy other preconditions has not been affected and should be applied in this case; *cf., Pro-Sys Consultants Ltd v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.) at paras 411 ff.

[221] In short, if, as I believe, the degree of vulnerability of members of the primary class is relevant to such other elements of liability, it is not permissible to conclude on the basis of statistical sampling, or a five-minute labelling test, that any of the class members was a vulnerable problem gambler to any particular degree. Individual inquiries would be necessary for this purpose and this would then be an example of the situation referred to by the Chief Justice in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (at para 29) where a determination of the proposed common issues would degenerate into a consideration of the claims of each of a potentially diverse group of individuals. There would have to be an inquiry into the personal circumstances, the gambling history, the extent of the addiction or compulsion to gamble of each class member at particular times, and, if the approach to causation in *Calvert* is accepted, his or her likely behaviour if OLGC had exercised its best efforts or exercised reasonable care. An

attempt to avoid problems of class definition and commonality at the certification stage by relying on statistical evidence at trial for the purpose of narrowing the class is not in my opinion acceptable.

[222] A similar problem exists in connection with the commonality of the issue relating to breach of duty. The experts are in agreement that a significant number of self-excluded persons would not have subsequently attempted to obtain entry to the gambling venues. In consequence, for them there can be no question of a failure to exercise OLGC's best efforts, or to take reasonable steps to exclude them, as the occasion for doing so would not have arisen.

[223] As Rady J. indicated in *Irving Paper*, it is established that the inability of some class members to prove harm or losses will not make a class objectionably over-inclusive. Here, however, it is not just that persons who did not attempt to re-enter would not have suffered losses from a breach, but rather that no breach would have occurred as the obligation could not be performed unless and until entry was attempted.

[224] Again, the CPA does not, in my opinion, permit the commonality of issues of breach to be determined - from studies of alcohol or drug addictions, as Dr Williams suggested, or otherwise – on the basis that it is statistically more likely than not that any self-excluded person, or number of them, would subsequently attempt to return to OLGC’s gambling facilities. Common issues are those that can be determined on a class-wide basis - and not on the basis of expert evidence of the statistical probability of commonality. Defendants in individual actions are not subjected to liability on the basis of statistical probabilities that the material facts that constitute a cause of action exist or have occurred. The CPA, as a procedural statute, does not alter this position except for the limited purposes referred to in section 23.

[225] In the form in which the case for certification has been presented, the absence of commonality in the five of the common issues I have identified as most fundamental would be fatal to the claim for certification as the remaining common issues are either dependent on them, or by themselves would not advance the proceeding to a sufficient extent. In view of the questions of law and fact that would remain to be determined after the trial of common issues there would be no possibility of an aggregate assessment of damages pursuant to section 24 of the CPA.

[226] The absence of commonality in the issue relating to breaches of duty could possibly, be cured by an amendment that would limit the class definition to self-excluded persons who subsequently achieved re-entry, unless the additional criterion is thought to be objectionably merits-based. The question whether a particular claimant did re-enter would then be another individual issue to be determined in respect of each class member before any possibility of reliance on the aggregation provisions in section 24 would arise.

[227] Plaintiff's counsel did not suggest that the class definition could properly be amended to limit the class to self-excluded persons who were pathological gamblers under the DSM-IV classification, or otherwise. As I have indicated, the restriction of the class to "compulsive

gamblers" in the class definition as originally framed in the pleading was subsequently and, in my opinion, properly deleted.

[228] Although the possibility of amending the class definition at the certification stage was referred to in *Hollick*, the plaintiffs have not, in my judgment, discharged the burden of providing even the required minimum basis in fact for a conclusion that the DSM-IV classification of pathological gamblers is sufficiently reliable and determinate to permit it to be used as a class criterion that would not beg the questions of the existence and relevance of different degrees of loss of control and vulnerability.

[229] Finally, on the question of aggregation, I should add that the evidence falls far short of satisfying me that statistical evidence that complies with the conditions in section 23 (1) of the CPA could establish that "the aggregate or a part of [OLGC's] liability to some all the class members can reasonably be determined without proof by individual class members" as required for an aggregate assessment of damages pursuant to section 24(1)(c) of the CPA.

[230] As the decision in *Calvert* shows, the amount of any liability for breach of contract - or of a duty of care - would depend on the resolution of difficult issues of causation. There is no evidence, and there has been no suggestion, that information compiled in accordance with generally accepted statistical principles could determine the losses caused by OLGC's failure to exercise its best efforts, or to exercise reasonable care, for all or any of the class members. The estimates provided by Dr Williams do not take into account the difficult question of a causal link, if any, between losses subsequently incurred by class members and the alleged breaches of duties by OLGC. Nor do they distinguish between losses incurred at OLGC’s gambling facilities and those incurred elsewhere, or by other available methods of gambling. They also appear to assume the existence of 10,428 class members at all times during the class period.

[231] For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member’s gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the CPA. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of OLGC’s efforts to enforce self-exclusion.

4. Section 5 (1) (d) - The Preferable Procedure

[232] As each of the requirements for certification in section 5 (1) must be satisfied, my conclusions on the over-inclusiveness of the class definition, and the issue of commonality, require the dismissal of the motion to certify the proceeding. In these circumstances, the need to consider the preferability of a class action over individual actions does not arise. However, it follows from the findings I have made that a class proceeding would not be preferable to

individual proceedings in terms of fairness and efficiency viewed in the light of the legislative objectives of judicial economy and access to justice.

[233] The procedure under the the CPA could not be adapted fairly and efficiently to resolve the individual issues relating to the degrees of vulnerability of each of 10,428 class members for the purpose of determining whether actionable breaches of duty occurred - including the question of unconscionability - as well as whether losses can be attributed causally to any such breaches and, subject to a possible application of section 4 of the *Negligence Act*, R.S.O. 1990, c. N. 1, degrees of fault for the purposes of contributory negligence.

[234] I agree with counsel for OLGC that these individual issues do not lend themselves to a summary determination as is contemplated by section 25 of the CPA. I am satisfied that they cannot be dealt with fairly and adequately without evidence, and a detailed consideration, of the degree of vulnerability, and the circumstances, of each class member. To wrap them all into one proceeding would, in my opinion, make it complex and unmanageable to an extent that would far outweigh the benefits to be obtained from subjecting them to the procedure in the CPA. As I have indicated, the attempt to avoid the individual issues by pleading that all class members were problem gamblers in a severe, or pathological, sense must be rejected. Evidence is required for each of the requirements for certification other than that in section 5(1)(a).

[235] Similarly, the excessively individualistic aspects of the claims asserted by the plaintiffs, are not avoided by their counsel's characterisation of the claims as "systemic". Where, in cases such as *Rumley* v. *British Columbia*, [2001] 3 S.C.R. 184, such a characterization has been found to be appropriate and helpful, it has been predicated on a material lack of diversity among the members of the class. That is not the case here.

[236] The evidence does not support a conclusion that all class members were pathological problem gamblers, and the omission to refer to problem gambling in the formulation of the common issues does not alter the fact that the identification of the class members as vulnerable is fundamental to the plaintiffs' case for certification as well as, in the ultimate analysis, the tenability of their individual claims.

[237] This is a situation in which, in my opinion, the procedure under the CPA would have disadvantages rather than any significant advantages over individual actions in which the focus would be entirely on the circumstances and experience of a particular individual rather than simultaneously on those of a potentially large class of persons with diverse backgrounds and gambling histories for whom liability could only – but could not properly - be established by the use of statistical evidence.

[238] In view of the nature of the individual inquiries, and the difficulties of proof relating to the existence of losses, I am not persuaded that certification would appreciably advance the legislative objective of judicial economy. The procedure under the CPA has its own associated special costs – including but not limited to those of giving notice. In view of these costs, and the uniqueness of the personal circumstances and gambling history of each of the class members, I

am of the opinion that the expense and complexity of attempting to dispose of all their claims in one inevitably protracted proceeding is likely to outweigh any economy achieved by a resolution of the questions of interpretation, and the adequacy of OLGC's efforts to perform its obligations, in a single trial.

[239] As far as access to justice is concerned, this is not a case where the amounts at stake are so small that individual proceedings would be prohibitively expensive. The evidence is, again, that nine individual actions have been settled to date with payments of $167,000 on average and another four actions are pending. Access to justice would be enhanced only to the extent that class members may well prefer the relative anonymity of a class proceeding. However, passive participation would not be an option and class members would be at risk for the costs of resolving the individual issues.

[240] Given the status of OLGC as a government agency, and the publicity that successful individual actions are likely to receive - as well as steps already taken by OLGC in 2007 and 2008 to find means for making self-exclusion programs effective - behavioural modification would not, in my opinion, weigh heavily in favour of certification.

5. Section 5(1)(e): The Representative Plaintiffs and the Litigation Plan

[241] Counsel for OLGC raised no objections to the suitability of Mr Dennis and Ms Noble to represent the class if the proceeding was otherwise amenable to certification. In their affidavits sworn for the purpose of the proceeding they deposed to their understanding of their responsibilities as representative plaintiffs if the proceeding was certified. They are obviously intelligent persons and, having lived through the harrowing experiences I have described, their understanding and sensitivity to the pressures created by problem gambling would assist them in communicating with members of the class.

[242] A prodigious amount of work has been undertaken by plaintiffs' counsel in preparing this difficult case. If certification had been granted, I have no doubt that they would have guided the plaintiffs through the subsequent stages of the litigation in a skilled and professional manner.

[243] Counsel for OLGC were critical of the litigation plan filed on behalf of the plaintiffs. In counsel's submission, this did not adequately address procedures for resolving the individual issues. I believe the criticisms have merit, but in view of the findings I have made on the individual issues, the proposed plan is obviously deficient.

CONCLUSION

[244] Despite the very able efforts of plaintiffs' counsel, the issues that are truly common are far outweighed by the many individual issues requiring a consideration of the personal circumstances, gambling history and degree of autonomy of each class member. In my judgment, the proceeding is not amenable to a fair and efficient determination under the CPA, and it has not been shown that this would be preferable to individual actions. The attempt to avoid these

conclusions by reliance on statistical probabilities would not be fair to the defendant and would do violence to the concept of the CPA as a purely procedural statute.

[245] The motion is dismissed. If the parties are unable to agree on costs, written submissions on behalf of OLGC will be received if made within 21 days of the release of these reasons and the plaintiffs will have a further 14 days in which to respond. The submissions should, of course, refer to the possible application of section 31(1) of the CPA.

Cullity J.

Released: March 15, 2010

CITATION: Dennis v. OLG, 2010 ONSC 1332

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PETER AUBREY DENNIS and ZUBIN PHIROZE NOBLE

Plaintiffs/Moving Parties

– and –

ONTARIO LOTTERY AND GAMING CORPORATION

Defendant/Respondent

REASONS FOR JUDGMENT

CULLITY J.

Released: March 15, 2010