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Article

Compulsive Gambling Litigation: Casinos and the Duty of Care

Joseph M. Kelly and Alex Igelman

CASINOS THROUGHOUT the world have been sued for negligence because they breached an alleged duty of care to patrons. One major duty of care issue is self-exclusion of gamblers. Australia, Canada, the U.S., and other countries have required or encouraged casinos and other gaming entities to develop procedures to allow gamblers to self-exclude themselves mostly because they believe they have a gambling problem. Self-excluded patrons who return to casinos and lose money have often sued casinos for breach of duty of care and other causes of action.

Self-exclusion of gamblers was first instituted in Manitoba, but the concept became commonplace after Missouri established self-exclusion policies in 1996. The Missouri regulatory authorities had considered allowing self-excluded gamblers to sue a casino if it breached a duty of care by not preventing a self-excluded patron from entering a casino. They decided against such a policy because of the overwhelming testimony from gambling treatment professionals that permitting litigation would allow the self-excluded gambler to shift responsibility from himself to some other entity.

The notion of self-exclusion and responsible gambling procedures are now relatively common and widespread and continue to grow with the introduction of new venues and forms of gambling. Most, if not all, Canadian jurisdictions have some form of responsible gambling measure in place, with other countries following suit. In the past decade, there has been litigation by self-excluded compulsive gamblers in common law jurisdictions such as Ontario, the U.S., Great Britain, and Australia as well as code jurisdictions such as Austria, France, Germany, and Korea. Generally the plaintiffs allege that the casino was negligent in breaching its duty of care to the self-excluded gambler and that the form, which generally releases a casino from liability through a limitation of liability clause, is unenforceable because it is against public policy. Some jurisdictions by statute will deny relief to a self-excluded gambler who manages to enter the casino and lose huge amounts of money.

There have been numerous academic studies that discuss the purpose and effectiveness of a self-exclusion policy. Most have concluded that the burden of self-exclusion should be on the gambler alone and that any attempt to shift even part of the burden to the casino would be unproductive.

This would be the opinion of Carol O'Hare, "Self-Exclusion—Concept vs. Reality";[1] the National Council on Problem Gambling, *Task Force on Self Exclusion* (October 2003); Alex Blaszczynski, Robert Ladouceur, and Lia Nower, *"Self-exclusion: A Proposed Gateway to Treatment Model";*[2] and Jamie Cameron, "Problem Gamblers and the Duty of Care: A Response to Sasso and Kalajdzic."[3]

Other authorities, especially lawyers, often disagree with the opinion of these problem gambling professionals and believe there should be liability if the casino is negligent in failing to self-exclude, e.g., William V. Sasso and Jasminka Kalajdzic, "Do On-

Joseph Kelly, Ph.D., J.D., is professor of business law at SUNY College at Buffalo.

Alex Igelman is a Toronto lawyer who practices gaming and entertainment law exclusively.

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[1] 8(3) GAMING L. REV. 189 (2004).
[2] 7(1) INTERNATIONAL GAMBLING STUDIES 59–71, (April 2007).
[3] 11(5) GAMING L. REV. 554–571 (2007).

tario and its Gaming Venues Owe a Duty of Care to Problem Gamblers?"[4] Phillip M. Osanic, "An Examination of the Potential for Finding Government Liability in the Context of Compulsive Gambling,"[5] and Andy A. Rhea, "Voluntary Self Exclusion Lists: How They Work and Potential Problems."[6]

What is often overlooked is that it was compulsive gambling experts who strongly rejected allowing self-excluded gamblers to sue casinos. Missouri, in 1996, was the first U.S. jurisdiction to adopt self-exclusion. Interestingly, when the idea of self-exclusion from excursion gambling boats was first considered in Missouri, it was the problem gambling treatment community who feared self-exclusion programs might exacerbate the problem.

> [Problem gambling experts] noted that while our intentions were good, the only way people can truly get better is if they take control and take on the responsibility for keeping themselves out of the casinos. It is wrong to put the responsibility in the casino's hands because then the individual never really takes a step in acknowledging his problem or trying to fix it. And this allows him to ultimately blame the casino if he fails.[7]

Typical of the comments received concerning self-exclusion would be that of the Texas Council on Problem and Compulsive Gambling at the time Missouri was developing a policy for litigation by self-excluded gamblers.

> One counselor perhaps verbalized it best by saying, "Given the personality of many of male ego-driven compulsive gamblers, I'm afraid they would see the ban as a challenge to see if they could beat the system." Officials at Casino de Montreal, in fact, report that some gamblers do just that. Nearly all of the counselors felt that the ban would be of little help unless the gambler viewed recovering from the gambling addiction as his/her own personal responsibility.[8]

According to Carol O'Hare of the Nevada Council on Problem Gambling (NCPG), it is essential that the burden of self-exclusion be placed on the problem gambler *alone*. She stated in 2004:

> If the appropriate forms are signed and the required information provided, the gambler can self-exclude without any proof or measure of his true commitment to change. This creates a risk for potential abuse of these programs by individuals who are in total denial and see the casino as the source of their problem rather than taking responsibility for their own actions. Imagine the reinforcement of that denial if the self-excluded gambler successfully enters the casino, gambles and loses, then received a monetary award as the result of a lawsuit in which he blames the casino for not keeping him out. To my knowledge pathological gambling is not studied much in law school, so it's not surprising that there are attorneys willing to make this argument on behalf of their client, still ignorantly believing that money will help the gambler solve his problem.[9]

In the National Council on Problem Gambling, "Discussion Paper On Current Voluntary Exclusion Practices."[10] The NCPG recommended, *inter alia*,

> "jurisdictions should carefully document the application process. The following issues should be addressed in the application forms and associated documents:
>
> (a) The application should verify the applicant's understanding of the program's rules, procedures and limitations. It should also verify the applicant's responsibilities.
> (b) The application should include a waiver and release to verify that the applicant is entering into the program voluntarily and relieving the regulatory body and the participating entities (casinos, race tracks, other gambling venues) from liability for enforcing the provisions of the program. This means that the gambler is releasing the casino operator from any liability as-

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[4] 10(6) GAMING L. REV. 552 (2006).
[5] 6(3) GAMING L. REV. 229 (2002).
[6] 9(5) GAMING L. REV. 462, 469 (2005).
[7] Carol O'Hare, Self-Exclusion—Concept vs. Reality, supra note1, quoting Kevin Mullally, then Executive Director of the Missouri Gaming Commission.
[8] Letter, Texas Council on Problem and Compulsive Gambling, June 8, 1996 (on file with author).
[9] O'Hare, *supra* note 1, at 191.
[10] National Council on Problem Gambling, *Task Force on Self Exclusion* (Oct. 2003) at III.

> sociated with the administration of the program. It should be designed to ensure, to the extent legally possible, that no cause of action can arise because of the voluntary exclusion process . . .

The NCPG recommended the following issues should be addressed in any self-exclusion policy.

2. Regulatory bodies should require gaming operators to check against the self-exclusion list anytime it is practical to do so and when the patron is required to produce positive identification. Examples include check cashing, slot club memberships and instances where IRS form W-2G is required.
3. Regulatory bodies should require self-excluders to report violations of their exclusion. This will help to avoid the gambler trying to deflect blame for their relapse on gaming operators or regulators. The gambler will have difficulty laying all the blame on others if he was required to report each instance of his self-exclusion violation. It also allows regulators and gaming operators to alert floor and enforcement personnel to be on the lookout for the violator.
4. Regulators should require gaming operators to remove self-excluders from all mailing lists and players clubs.
5. The committee believes that arrest for trespassing is an effective deterrent for many gamblers. Jurisdictions should develop methods to direct repeat offenders into mandatory counseling.
6. A consensus of the committee believes that is should be clear to the self-excluder that it is not the responsibility of the casino or the regulatory agency to prevent them from entering a gambling venue.[11]

Lia Nower, now Director of the Center for Gambling Studies at Rutgers University, has suggested that the reporting mandate of paragraph 3 has been one of the reasons why the Missouri self-exclusion policy has been most successful. It places the burden on the self-excluder to report any relapse to the casino.[12]

In "Self-exclusion: A Proposed Gateway to Treatment Model,"[13] Alex Blaszczynski, Robert Ladouceur, and Lia Nower analyze various self-exclusion issues. They clearly conclude that the burden of exclusion should not be on the gambling operator.

> First, problem gamblers must clearly understand that the self-exclusion agreement between the gambler and gaming operator does not constitute a formal contract enforceable by law . . . Rather, it represents an arrangement wherein a venue voluntarily offers, or is obligated by law to offer a service where:
>
> Individuals identifying themselves as problem gamblers may approach a gaming operator or delegated staff with a request or application to exclude themselves from future entry into a gaming venue for a determined period of time (6 months to lifetime);
>
> The individual agrees to be removed from the specified gaming venue by the operator or delegated staff should they be identified as in breach of the self-exclusion order;
>
> The individual agrees to have their names removed from mailing, marketing and promotional lists and databases; and
>
> The individual understands that a penalty may be imposed for breaches of the self-exclusion agreement: this may include assent to confiscation of winnings (e.g. Illinois, USA), arrest for trespass (e.g. Missouri, USA) or fine (e.g. New South Wales, Australia).[14]

The authors also believe it would be impossible for an operator to enforce any ban.

> Absent a statutory requirement to produce valid identification to gain entry to a venue, it is unrealistic for gamblers to expect the gaming staff, armed with photos, to detect any gambler in breach of the self-exclusion agreement in a crowd, particularly in jurisdictions

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[11] *Id.* at IV.
[12] Interview with Lia Nower, Oct. 24, 2007.
[13] 7(1) Int'l Gambling Studies 59, 63 (April 2007).
[14] *Id.* at 63.

> where self-excluders number in the thousands. This is particularly impractical given the number and frequency of patrons entering venues, the high turnover of casual staff and the changes in individual appearance over time.[15]

Thus, the consensus of experts in compulsive gambling is that the burden of exclusion is on the player alone and there should be no liability to a self-excluded gambler absent extraordinary conditions.

IN MOST OF THE WORLD SELF EXCLUDED GAMBLERS HAVE GENERALLY BEEN UNSUCCESSFUL IN LITIGATION

United States

Compulsive gamblers have generally been unsuccessful when they sue casinos for negligence in not preventing them from returning to gamble. In the United States, ordinarily, a compulsive gambler will not be able to survive summary proceedings to dismiss the complaint.

A recent New Jersey decision, which refused to let a self-excluded gambler set aside a lifetime exclusion, stressed the following:

> In essence, self-exclusion is designed as a means to help problem gamblers help themselves; it places responsibility squarely on self-excluded persons themselves to refrain from prohibited activities, albeit with the assistance and cooperation of the casinos.[16]

In 2007, Arelia Taveras sued six New Jersey casinos for $20 million in a 12-count complaint alleging, inter alia, that they breached their duty of care to her after she had identified herself as a compulsive gambler. She also alleged that defendants were liable pursuant to a Racketeering Influenced and Corrupt Organizations Act (RICO) violation because they "collaborated with each other to intentionally and maliciously entice and lure" her into "further gaming activities outside the state of New Jersey in violation of 'RICO' statutes."[17] In September 2008, her complaint was dismissed primarily because the "extraordinary, pervasive, and intensive" state gambling regulations "have notably declined to impose the duty upon her which plaintiff relies here."[18] Her RICO claims were also dismissed because she failed "to plead the predicate criminal act of mail fraud with particularity."[19]

Indiana has been the forum for most duty of care gambling litigation cases, with the casino winning every case without the matter being resolved by the state supreme court. In *Caesars Riverboat Casino LLC v. Kephart*,[20] the compulsive gambler counterclaimed when sued for her gambling debts after her check bounced. She alleged the casino "took advantage of her pathological gambling condition to unjustly enrich itself."[21] The trial court denied Caesars' motion to dismiss her counterclaim.

The appellate court, in reversing the trial court, cited two reported Indiana compulsive gambling cases as authority for allowing dismissal of her counterclaim.[22] The court also analogized her claim to that of a compulsive shopper where there was no common law duty to refuse to sell goods.[23] Furthermore, a casino operator, "does not act in a reckless manner by marketing to individuals it knows to be compulsive gamblers," anymore than a department store would market to a compulsive shopper.[24] *Caesars* also cited *Taveras* as authority for deferring compulsive gambling matters to the "highly regulated" gaming industry board.[25]

A strong dissent rejected the department store analogy and concluded the matter was similar to a tavern enticing an alcoholic with free food. Thus, there should be a casino duty, especially when Caesars knew it was dealing with a pathological gambler and "lured her into its casino with complimentary transportation, lodging, food, and drinks, let her gamble away $125,000 in borrowed funds without investigating her creditworthiness, and then sought to triple its take by suing her for treble damages plus attorney's fees."[26] The dissent then made a moral argument against the casino.

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[15] *Id.* at 64.
[16] I/M/O Petition of S.D. for Removal from the Voluntary Self-Exclusion List, 399 N.J. Super. 107, 943 A.2d 188, 2008 N.J. Super. LEXIS 65.
[17] Taveras v. Resorts International Hotel, Inc., et al., Case No. 1:07-cv-04555-RMB-JS, Complaint, par. 1, 5, 6 (D.N.J.).
[18] 2008 U.S. Dist. LEXIS 71670 at § 14.
[19] *Id.* at § 24.
[20] 2009 Ind. App. LEXIS 514.
[21] *Id.* at § 1.
[22] *Id.* at § 3–4.
[23] *Id.* at § 9.
[24] *Id.* at §§ 17, 21.
[25] *Id.* at § 24.
[26] *Id.* at § 38.

> Given the apparent size and steadiness of the revenue stream generated by riverboat casinos, it seems clear that both the casinos and the State of Indiana share a common interest in gamblers—pathological or otherwise—losing as much money as quickly as possible. One wonders if Indiana's legislators—and, more importantly, their constituents—have any qualms about balancing the State's budget on the backs of gamblers, especially those who are least able to resist and/or afford gambling. I would conclude that public policy favors imposing a common law duty on Caesars in this case.[27]

Finally, the dissent cited a highly questionable statistic from a law review article by an anti-gambling professor as authority for the dubious assertion that: "It is estimated that '27 percent to 55 percent of all casino revenues come from just pathological gamblers.'"[28]

On April 15, 2009, plaintiff filed a petition for rehearing, alleging the decision would be immunizing a tort and "countenancing the intentional infliction of harm to a person with a known malady." Furthermore, the petition alleges the appellate court mischaracterized casino conduct as "mere 'marketing.'"[29]After the petition was denied, plaintiff petitioned to transfer the matter to the Indiana Supreme Court.

Other Indiana decisions have also denied relief to a compulsive gambler suing the casino. In *Merrill v. Trump Indiana, Inc*.,[30] the plaintiff claimed the casino failed to exclude him notwithstanding his name being on the casino eviction list. In affirming summary judgment for the casino, the federal court of appeals stressed that there was no duty of care pursuant to either Indiana statutory or common law. Moreover, courts have occasionally threatened to assess damages against a plaintiff who has sought recovery for gaming losses. In *Williams v. Aztar Indiana Gaming Corp.*,[31] a compulsive gambler sought damages on various causes of action, including the Racketeer Influenced and Corrupt Organizations Act (RICO). The plaintiff had alleged that the promotional materials sent to him by the casino constituted mail fraud, which was the basis of his RICO claim to obtain federal jurisdiction. In rejecting his appeal, the court of appeals concluded the RICO claim to obtain federal jurisdiction was so frivolous that his lawyers should "show cause" as to why they should not be sanctioned.

Those states that have mandatory self-exclusion provisions for compulsive gamblers will generally not permit a self-excluded gambler to sue the gaming entity if it negligently allows the gambler entrance, and the gambler must sign a waiver of liability, e.g., Illinois, Indiana, Louisiana, Michigan, Mississippi, Missouri, New Jersey, and New York.[32] Most recently, the California Gambling Control Commission, on March 10, 2006, concluded there should be no cause of action by a self-excluded gambler and "the responsibility for following either the self-exclusion or self-restriction is on the patron."[33]

There might, however, be liability for intentional misfeasance. One case in the United States involved a sports figure, Joe McNeely, a Mississippi resident who sued four Louisiana casinos in federal court in New Orleans, La.[34] His attorney had written to two of the four casinos informing them that his client was a compulsive gambler and asked the casinos neither to contact his client nor let him gamble or obtain credit. Several casinos continued to send him complimentary items resulting in the gambler losing about $2 million after notification to the casino of his compulsive gaming. The case subsequently was resolved pursuant to a confidential settlement.

One related issue is whether a gambler might be able to sue successfully a manufacturer of drugs where the effect of the drug is to increase compulsive gambling. In the U.S. there is litigation by gamblers against both the manufacturer of pills and casi-

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[27] *Id*. at § 41–42.
[28] *Id*. at § 38–39; John Warren Kindt, "*The Insiders" for Gambling Lawsuits: Are the Games "Fair" and Will Casinos and Gambling Facilities be Easy Targets for Blueprints for RICO and Other Causes of Action?*, 55 Mercer Law Rev. 529, 545 (Winter 2004).
[29] April 15, 2009, Petition at 1.
[30] 320 F.3d 729 (7th Cir. 2003); *accord.* Brown v. Argosy Gaming co. L.P., 384 F.3d 413 (7th Cir. 2004).
[31] 351 F.3d 294 (7th Cir. 2003); *see also* Stulajter v. Harrah's Indiana Corp., 808 N.E. 2d 746 (Ind. Ct. App. 2004).
[32] Peter Collins, Joseph Kelly, *Problem Gambling and Self-Exclusion: A Report to the South African Responsible Gambling Trus*t, 6(6) Gaming L. Rev. 517–531 (2002). See generally Joseph M. Kelly, *Enforcement of Casino Gambling Debts*, 71 Am Jur. P of F. (3d) 193–320, §27, discussing lack of capacity such as intoxication and compulsive gambling as defenses to enforcement of gambling debt complaints.
[33] Initial Statement of Reasons, CGCC-GCA-2006-R-3, Program for Responsible Gambling, citing Peter Collins and Joseph Kelly, *supra* note 32, at 519, 530.
[34] *Id.* at 525.

nos. On Feb. 17, 2006, a retired physician, Max Wells, filed a lawsuit[35] in federal court against SmithKline, the manufacturer of Requip and seven Nevada casinos including Wynn Las Vegas, LLC; Las Vegas Sands, LLC; Mandalay Corp.; Treasure Island Corp.; Harrah's Las Vegas, Inc.; Hard Rock Hotel, Inc.; and Bellagio, LLC.

The amended complaint stated that:

> Wells, a Parkinson's patient, sues SmithKline for failing to give adequate, proper and non-deceptive warnings that Requip, one of its drugs used to treat Parkinson's disease, could cause its users to develop an irresistible impulse to gamble. SmithKline's failure to give proper warnings rendered Requip unreasonably dangerous when used as intended and as authorized by SmithKline. Defendants' failure to give proper warnings was the causative nexus of Wells' developing an irresistible gambling compulsion and thereby losing approximately $12.2 million to the Casinos and certain other casinos and online gambling sites.[36]

The complaint's theft count against the casino consisted of an allegation.

> Each Casino appropriated more than $75,000 of Wells' property, with an intent to deprive him of that property, and without his effective consent because he was, at that time, suffering from a mental defect or disease, or intoxication, known to the Casinos, which prevented him from making reasonable dispositions of his property. Texas Penal Code, §§ 31.01, 31.03, 31.09. His property, in the form of cash, was appropriated from Wells from various accounts in Texas, given in payment of "markers" mailed to him in Texas from Nevada, so that although the gambling occurred in Nevada, elements of the offence of theft under the Texas Theft Act occurred within Texas. The theft was also accomplished through the use of gifts, promotional materials, telephone calls and gifts sent or given to Wells in Texas by the Casinos. The Casinos knew that Wells had Parkinson's disease, that he was taking medication for his illness, and in some instances specifically knew that he was taking either Mirapex or Requip. As the result of heavy publicity surrounding the publication of a Mayo Clinic study of Mirapex and Requip in mid-2005, the Casinos were specifically aware of the propensity of such drugs to create an irresistible gambling compulsion.[37]

In his demand for damages the plaintiff sought:

1. Judgment against SmithKline under Count One for actual damages in the amount of approximately $12,200,000;

2. Judgment against the Casinos for damages, as follows:

(a) Wynn Las Vegas, LLC:	at least	$3,000,000;
(b) Las Vegas Sands, LLC:	at least	$3,500,000;
(c) Mandalay Corp.:	at least	$1,400,000;
(d) Treasure Island Corp.:	at least	$ 800,000;
(e) Harrah's Las Vegas, Inc.:	at least	$ 500,000;
(f) Hard Rock Hotel, Inc.:	at least	$ 140,000;

Plus reasonable and necessary attorneys fees.

By February 2007, Wells had settled his case against Hard Rock and all other casinos had been dismissed on jurisdictional grounds. Only SmithKline remained as a defendant. On Feb. 18, 2009, the court granted defendant's motion for summary judgment on plaintiff's product liability failure to warn claim because "he cannot prevail on his failure to warn claims without proving general causation. . . ."[38]

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[35] C.A. no. A-0/6-CA-126-LY (W.D. Tex. 2006).
[36] *Id*. ¶ 9.
[37] *Id*. at ¶ 21.
[38] Wells v. SmithKline, 2009 U.S. Dist. LEXIS 21251 (W.D. Tex. 2009), at § 38.

A different result was reached in *Charbonneau v. Boehringer Ingelheim and Pfizer*.[39] In *Charbonneau*, a Mirapex user prevailed on strict liability in defective design, negligent failure to warn of the risks of pathological gambling, and misrepresentation that Mirapex was safe. The jury, on July 30, 2008, awarded $394,300 in compensatory damages, $85,000 for loss of consortium, and $7.8 million in punitive damages. The jury concluded his wife was 8 percent negligent and Boehringer and Pfizer were each 46 percent negligent. On February 17, 2009, the case was resolved and the matter dismissed with prejudice.[40]

Plaintiffs have generally not succeeded in obtaining class action relief against casinos. In *Poulos v. Caesars World, Inc.*,[41] the federal court of appeals affirmed a district court denial of a class action RICO and fraud allegations. If allowed, the class "would encompass nearly everyone who had played video poker or electronic slot machines within the last 15 years." The plaintiffs had alleged, inter alia, that electronic gaming machines "are operated by computer programs which determine, in advance, the outcome of each particular play." They also contend that the casinos have perpetuated false perceptions through the appearance and labeling of the machines, advertising, promotional efforts, and concealment of information known to them that is not generally available or understandable to the public. The case had an unusual procedural history of "nearly ten years of judicial wrangling spanning several judges and an over seventy-page civil docket . . ."[42] Once class action status was denied it would not be feasible for each individual to file separate lawsuits. *Poulos* may be relied on by Canadian authorities in denying class action status.

Australia

In Australia, court decisions clearly supported a finding that there was no casino duty to exclude a compulsive gambler. Chris Reynolds had sued a gaming establishment, the RSL Club, for $57,000 because it had not excluded him from the club as he had requested and for negligently extending credit to him. In affirming dismissal of his appeal, Spigelman, C.J., stated bluntly:

> Save in an extraordinary case, economic loss occasioned by gambling should not be accepted to be a form of loss for which the law permits recovery. I make allowances for an extraordinary case, without at the present time being able to conceive of any such case. . . . The Interest sought to be protected is the avoidance of a risk of loss of money through gambling. That risk, when it came to pass, was entirely occasioned by the Appellant's own conduct. It is not an interest, which, in my opinion, the law should protect.[43]

The result might be different had the casino gone beyond negligence and in an extraordinary case actually encouraged a compulsive gambler to continue wagering.

In *Foroughi v. Star City Pty Limited*,[44] a federal court on Sept. 27, 2007 rejected the claim of a problem gambler after he lost money after self-excluding himself from Star City. After completing a voluntary self-exclusion procedure on May 18, 2004, he claimed to have entered the casino on 65 occasions and lost $612,055. On several occasions, he was detected by casino security and escorted from the casino. The self-excluded form stated in relevant part:

> (25) "I undertake that I will, during the period of voluntary exclusion:
>
> - consider myself a self excluded person; and
>
> - recognize that it is my responsibility and I undertake not to enter or gamble within the gaming areas at Star City, being the main gaming floor and the Endeavour Room; and
>
> - seek and continue to seek the assistance and advice of a qualified and recognized problem gambling counselor."

The judge clearly recognized the casino difficulty in enforcing self-exclusion policy.

> (60) In 2003/2004, approximately 9.03 million

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[39] 2008 WL 3853163 (D. Minn.).
[40] Westlaw: Order Dismissing Case per Stipulation of Dismissal with Prejudice by all Parties.
[41] 379 F.3d 654 (9th Cir. 2004).
[42] *Id.* at 659.
[43] Reynolds v. Katoomba RSL All Services Club Ltd. (2001) 53 NSWLR 43.
[44] [2007] FCA 1503.

patrons entered the casino. In 2004/2005, approximately 8.72 million patrons were admitted.

(61) In 2003/2004, 490 exclusion orders were issued by Star City, of which 186 were voluntary exclusion orders. In 2004/2005, Star City issued 504 exclusion orders, of which 163 were voluntary exclusion orders.

(62) In 2004/0025, Star City had in place approximately 4,000 current exclusion orders, of which over 1,000 were voluntary exclusion orders.

The judge, citing dicta in *Preston v. Star City*, (1999, NSWS 1273) concluded that there was nothing in the Casino Control Act that suggested "a private right of action additional to the obligations imposed upon casino operators."

Even if there were a private action, there would be prerequisites.

(101) These requirements are, first, knowledge that a particular person is in the casino, and, second, knowledge that the person is the subject of an exclusion order.

Furthermore, *Foroughi* adopted the *Reynolds* reasoning that no duty of care was owed by a casino to a problem gambler. Even assuming a duty, there would be no breach of any duty of care.

(133) The gravamen of Mr. Foroughi's attack on the adequacy of the systems was that Star City should have put in place a card entry or facial recognition system or a longer hot list [person of interest placed on a board].

(134) The effect of Star City's evidence was that facial recognition technology is not sufficiently accurate or suitable for use in casinos. This evidence is found in the affidavits of Mr. Clark and Mr. Lorraway. Evidence of Ms. Russell is to the same effect.

(135) The evidence of Mr. Clark and Mr. Lorraway on the issue of personal identification measures is that they are unsuitable for use in casinos. Mr. Mackay's evidence under cross-examination on this topic was to the same effect as that of Messrs. Clark and Lorraway.

(136) Mr. Lorraway also gave evidence that the hot list is limited to ten persons so as not to dilute its effectiveness as a tool in the detection of excluded persons.

(137) I accept Star City's evidence of the adequacy of these measures. However, it is necessary to mention one caveat. This is, that as Mr. Lorraway observed in his evidence, the Casino Control Authority in its 2003 report under *s. 31* of the *Casino Control Act* was critical of limitations of a system that relies on human beings to detect excluded persons.

In an excellent analysis of *Foroughi*, Harry Ashton,[45] an Australian lawyer, states the case is especially important since it was heard in federal court because of the allegation alleging a violation of the Trade Practices Act. As a result of *Foroughi*,

It will not be enough for plaintiffs to merely rely on their self exclusion to establish a duty to prevent entry to a casino. Indeed it is clear that the responsibility falls almost exclusively upon the shoulders of a person who self excludes rather than the casino to prevent themselves from entering and gambling.

The result might be different if the casino acted intentionally or recklessly. In *Preston v. Star City*,[46] a New South Wales Supreme Court distinguished *Reynolds* and refused to dismiss an action by a compulsive gambler against the casino largely because:

In *Reynolds* the plaintiff's addiction to gambling was known but nothing was done to assist him despite his requests. The allegations in para 9 go beyond that. Para 9 asserts not only knowledge of the weakness, but active encouragement and exploitation of it. That is a consideration absent from *Reynolds*.

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[45] Harry Ashton, *Australian Compulsive Gambler Fails in Bid to Sue Casino–Legal Status Settled?*, GAMBLINGCOMPLIANCE.COM, Oct. 5, 2007, at 4.

[46] Preston v. Star City PTY Ltd. (N03), NSWSC 1223 (2005) ¶ 45.

The *Preston* court stressed the casinos supplied Preston with alcohol when the casino knew Preston was intoxicated.[47]

Besides *Preston*, one other case where the plaintiff has survived summary pleadings is *Kakavas v. Crown Casino*. In *Kakavas v. Crown Casino Limited,* the plaintiff, a pathological gambler sought $30 million plus in damages from Crown Casino. He claimed, inter alia, that Crown Casino tried to lure him back by encouraging the plaintiff to get a letter from a psychiatrist that would allow him to resume gambling, by giving the plaintiff bags with cash containing $30,000 to $50,000, by switching his drinks from non-alcoholic to alcoholic, and by other "unconscionable conduct." The court, after stressing there was no common law duty of care, concluded that "these allegations of active and deliberate intervention by the casino operator in the knowledge of, and for the exploitation of, the patron's vulnerability should be allowed to go to trial, albeit not as claims in negligence."[48] Thus all claims were struck except for the unconscionable count.

In March 2008, Crown Casino admitted in documents submitted to the court that it gave Kakavas hundreds of thousands of dollars in bags and boxes to spend on baccarat. On March 13, 2008, the former chief officer of Crown had to file his own defense when Kakavas charged him as being responsible for luring him back to Crown. In further discovery, Crown officials were asked to submit sworn answers whether they were aware "Kakavas was banned and if so when they became aware of this."[49] Apparently, Crown was fined AUS$115,000 for violating gambling regulations for giving Kakavas chips three times without payment. The trial ended in August 2009. The judge has indicated he will make a decision by Christmas 2009. Kakavas was also being sued in Australia for $1.4 million by Atlanta Paradise, a Bahamian casino. His lawyers have argued that the Bahamian gaming casino knew of his gambling addiction and that Bahamian gaming debts are unenforceable.[50]

Europe and Asia

Great Britain

British gaming law has been completely overhauled by the Gambling Act of 2005. Even before the enactment of the 2005 Act, the government regulatory authorities made it clear that licensed gaming entities would have to take measures concerning the problem of compulsive gambling by September 2007.

In *Calvert v. William Hill Credit Ltd*., a British court had to decide whether to award a problem gambler over £2 million in losses after he had excluded himself from William Hill. The court, in a 36-page decision noted:

> 1. This case raises, for the first time in an English court, the question of whether there are any circumstances in which a bookmaker an incur liability in negligence in respect of the gambling losses of a customer who is, and who is known by the bookmaker to be, a problem gambler. More specifically, the question is 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.[51]

Both sides produced expert psychiatric witnesses as to the distinction between a problem and a pathological gambler. The court also examined in detail the Australian cases of *Preston v. Star City, Reynolds v. Katoomba RSL All Services Club Ltd., Foroughi v. Star City*, and *Kakavas v. Crown Ltd*. The court then concluded, giving detailed reasons, that William Hill was not liable, notwithstanding this breach of duty and its failure to properly exclude the plaintiff from gambling and that Calvert's losses would not have been sustained "but for their negligence."

The trial judge concluded "it would fly in the face of common sense and be a travesty of justice" if

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[47] *Id*. at ¶ 16 (e)(d). The case has settled out of court.

[48] Kakavas v. Crown Limited & Anor [2007] VSC 526 (13 Dec. 2007). *Gambling Addict Lured, Court Told; Crown Admits to Offering Free Money and Private Jet*, THE AGE (Melbourne, Australia), Sept. 26, 2007. On Sept. 25, 2007, Crown's lawyer attempted to have the case dismissed on grounds the casino has no duty of care. "To use the words of Spiegelman . . . Kakavis and Preston will be hoping that their case will be the 'extraordinary case' where a duty will be recognized." Harry Ashton *Casino's Duty of Care to Problem Gamblers: An Australian Case Study*. GAMBLINGCOMPLIANCE.COM, June 29, 2007.

[49] *Crown Gets OK to Look at Gambler's Finances*, THE AGE (Melbourne, Australia), Mar. 25, 2009.

[50] *Casino Chasing Chronic Gambler for $1.4 Million*, HERALD SUN (Australia), Feb. 10, 2009.

[51] [2008] EWHC 454 (Ch), [2008] All ER (D) 170.

Calvert could sue successfully since he could "probably have ruined himself anyway by betting with one or more of that bookmaker's competitors." Even if the court did award damages, there would be a "very large" reduction because of Calvert's negligence. The appellate court affirmed the trial court decision largely "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."[52]

The appeals court also refused to allow Calvert to amend his claim to include breach of fiduciary duty and also opined it would have only reduced contributory damages by 30 percent had they allowed Calvert's claim.

Perhaps if plaintiff alleged breach of the statutory duties imposed under the 2005 Gambling Act and the Gambling Commission's license conditions and code of practice, plaintiff might have shown breach of statutory duty. Causation, however, might still have been a problem since plaintiff could have utilized numerous other bookmakers. An ingenious plaintiff could have alleged that all other bookmakers would have been assiduous in complying with their statutory obligations, and William Hill might have difficulty in refuting that claim.[53]

Europe and Asia code countries

Netherland casinos have utilized extreme procedures to identify members who are compulsive gamblers.

> There, patrons must show their identification before entering a casino. If the computer reveals a significant increase in visits or that a person has had 20 visits a month over the past three months, the gambler is approached to see whether he or she would like to sign a "visit limitation contract" or self-exclusion contract. . . . [54]

Switzerland has similar restrictions concerning the monitoring of potential problem gamblers.

In Austria, a compulsive gambler has been successful in litigation against Casinos Austria.[55] He received €499,729 when the court concluded Casinos Austria was liable for "'gross malfeasance and negligent behavior' by not doing enough research into their client's financial resources, and for failing to restrict the actions of a person who had all the signs of a compulsive gambler. Both [the trial and appellate] courts upheld Mr. Hainz's claim that casinos and betting houses had an obligation to check the financial situations of regular players and to refuse them entry if there was any suspicion surrounding their solvency."[56]

In Germany, the Federal Court of Justice in November 2007 ruled that German casinos must monitor slot machines to ensure that self-excluded gamblers are prevented access. The Federal Court of Justice had ruled in December 2005 that self-excluded agreements mandated that casinos utilize "reasonable efforts" to exclude the self-excluded who could seek damages after the December 2005 decision. In the opinion of experts, the November 2007 decision mandated that casinos develop identity verification procedures.[57]

France mandates that self-excluded gamblers be placed on "national databases of gambling addicts who have volunteered to be registered on banned persons lists, (since) regulation prohibits casinos to keep videos for longer than a month."[58] A French compulsive gambler sued a casino in 2005, but the case was dismissed because he failed to self-exclude himself.[59]

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[52] Calvert v. William Hill Credit Ltd., [2008] EWCA Civ. 1427, [2008] All ER (D) 155 (Dec.) ¶ 48.

[53] I am indebted to Tony Coles, Esq., for this observation.

[54] *The Big Bluff*, GLOBE-MAIL, Apr. 18, 2009.

[55] *Gambling addict wins a fortune in court ruling against casino; compulsive player is compensated by Austrian operator that failed to help him kick the habit*, SUNDAY TELEGRAPH (London), Feb. 22, 2004.

[56] *Austria—A Regulatory Report*, GAMBLINGCOMPLIANCE.COM, at 6–7.

[57] *German Casinos Contractually Obliged to Identify All Patrons, Says Court*, GAMBLINGCOMPLIANCE.COM, November 26, 2007.

[58] *Security Technology Used in Casinos*, A S INT'L, September 2007, at 51.

[59] See *French Casino Hit by Lawsuit*, BBC NEWS, Aug. 5, 2004. The gambler alleged the casino breached its duty of care to him. The case was dismissed partly because he did not self-exclude himself, seek counseling, or was able to corroborate losses. *Casinos Duty of Care to Problem Gamblers, An Australian Case Study*, GAMBLINGCOMPLIANCE.COM, July 4, 2007. See Ashton, *supra* note 48. He has dropped his appeal. <http://www.leparisen.fr> Nov. 2008.

It may, of course, be possible to utilize face identification and other techniques. Ladouceur, et al., acknowledge "(v)erifying everyone's identity would resolve the problem but is contrary to the prevailing values of North America, Australia, and New Zealand."[60]

In Asian code countries, litigation by compulsive gamblers to regain losses is very rare. Usually, litigation involving a compulsive gambler will be based on utilizing compulsive gambling as a reason why a gambling debt should not be enforced.[61] In Korea, a compulsive gambler, Chung, sued Kangwon Casino for $23.5 million for three years of gambling losses alleging "the government-run casino turned a blind eye to him making bets." When he was awarded only $2.2 million in November 2008, he decided to appeal because he claimed the sum was "not enough."[62]

Canada

Canadian provinces with casinos have all introduced self-exclusion programs (Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, and Saskatchewan). Most litigation has been in Ontario with pending litigation in Quebec, Newfoundland, and Nova Scotia. There have been four very high profile cases by compulsive gamblers primarily against the Ontario Lottery and Gaming Corporation's (OLGC) (now OLG), but also including other defendants.

Ontario

Self-exclusion lists include over 12,500 profiles of problem gamblers. Security guards at gaming facilities are quoted as saying, "it's an impossible task," and that some have "even written to superiors complaining the current system is failing and that it's impossible to remember all the faces."[63] By 2007, OLGC had settled nine cases purportedly for a combined $1.5 million ($166,000 average) in confidential agreements.

The major publicized cases, *Lisa Dickert, v. OLGC, Macaluso v. OLGC, Digalakis, Treyes v. OLGC, et al.*, and five other non-publicized cases[64] were lawsuits filed by compulsive gamblers against the OGLC, gaming operators, or casinos. Because gaming operations and casinos in Ontario are government controlled, the government or some branch or subdivision thereof will be a defendant in any claim naming a gaming operator or casino. Furthermore, the issue of self-exclusion from casinos was the most important issue in all but two of the nine cases. In those two cases where there was no self-exclusion by the gambler, the defendants' answer stressed that the gamblers failed to utilize the available self-exclusion forms.

The most important case with far reaching consequences was the *Treyes* case. Similar to the previous three Ontario compulsive gambling cases, the facts in Joe Treyes are tragic. In 1992 he was diagnosed with Parkinson's disease and in 1999, he was diagnosed a compulsive gambler. In 2000, he signed a self-exclusion form at Woodbine Racetrack, but three years later he returned to Woodbine. Unlike the Dickert, Macaluso, and Digalakis complaint, the *Treyes*[65] litigation is further complicated by the alleged connection between the plaintiff taking certain drugs and compulsive gambling.

The plaintiff in *Treyes* was assisted in his Parkinson claim by two Canadian experts: Dr. Mark Guttman and Dr. Robert Williams. Dr. Guttman is Co-Director of the National Parkinson Foundation Centre of Excellence at the University of Toronto and an investigator in Mirapex clinical trials. Guttman had opined since at least 2004 that there might be a connection between anti-Parkinson drugs and an uncontrollable gambling urge. Dr. Robert Williams, a Professor at the School of Health Sciences, University of Lethbridge, and Node Coordinator, Alberta Gaming Research Institute, in 2007 "had just received the largest grant ever to study gambling. And it will focus on a new racino in Ontario."[66]

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[60] Robert Ladoucier, Caroline Sylvain, and Patrick Gosselin, *Self -Exclusion Program: A Longitudinal Evaluation Study*, 23 J. Gambl. Stud. 85, 92 (2007).

[61] *Enforcement of International Gambling Debts*, 87AM. JUR. PROOF OF FACTS (3d), 1–124 (2006).

[62] *Gambler Sues Casino for Lost $23 mln dr Fortune: Report*, AGENCE FRANCE PRESSE, July 6, 2009.

[63] *Gamblers' Self-ban System Built on Quicksand?*, CBC, June 1, 2007.

[64] For discussion of the Dickert, Macaluso, and Digalakis litigation, see Alex Igelman, Joseph Kelly, *Status of Canadian Compulsive Gambling Litigation*, 9(2) GAMING L. REV. 116–118 (2005).

[65] Joseph Treyes v. Ontario Lottery Gaming Corp., 2007 WL 2039590 (Ont. S.C. J.), 2007 Carswell Ont. 4458.

[66] <http://www.innovationalberta.com/article.php?articleid=826>.

It should be noted the *Treyes* decision of July 11, 2007, involved a determination whether or not the lawyers for the compulsive gambler should be awarded a "premium for their professional services in this action. The premium sought is 14.5 percent of Mr. Treyes' damages."[67] The main action had been settled pursuant to a confidential settlement "following a one-day mediation."[68]

The Court determined there were the following novel "13 (14?) critical issues."

i. Pathological Gambling: OLGC's Knowledge of Illness & Policy

(a) Whether Joe was a pathological gambler ("PG")?

(b) Whether PG was an illness such that fault did not lie with Joe, regardless of the stereotypes associated with PG or problem gamblers?

(c) Whether Parkinson's disease played a role in Joe's PG?

(d) Whether the OLGC was knowledgeable about the consequences of PG and the financial, psychological, marital, and sometimes suicidal consequences thereof?

(e) Whether slot machines in the OLGC facilities contained addictive features?

(f) Whether the OLGC created a policy to combat PG?

ii. Proximity: Relationship Between OLGC and Joe

(g) Whether there was a special relationship between the OLGC and Joe to create the foundation for a duty of care?

(h) What was the nature of the duty?

iii. Implementation of Policy

(i) If there was a policy to combat PG, and there was a proximate relationship between the OLGC and Joe, whether the OLGC took "operational" steps to implement the policy?

(j) Whether the implementations, if any, of the OLGC's policy was reasonable in the circumstances?

iv. Joe's Economic Loss, Causation & Release

(k) Whether Joe attended the OLGC's facilities after proximity arose, gambled, lost and the quantum of all his cash losses [sic]?

(l) Whether Joe's depression, after diagnosis of PG, was due to Parkinson's disease or PG?

(m) Whether Joe was contributorily negligent in connection with the gambling losses?

(n) Whether Joe had released the OLGC from all claims and losses by signing a form drafted by the OLGC years before the within action?[69]

The order also states, "Pathological gambling is heavily laden with stereotypes, the most notorious of which is the notion that a gambler is the author of his or her misfortune and displays a lack of willpower."[70]

Treyes claimed to have lost $100,000 cash in playing slot machines at gaming facilities in Woodbine Racetrack and Mohawk Raceway.

> Mr. Treyes' attracted the attention of the CBC and the *National Post* both of whom reported on the details of Mr. Treyes' claim. On one occasion, Mr. Treyes asked a *National Post* reporter for a $5.00 loan so that he could get home from Woodbine.[71]

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[67] *Treyes v. OLGC*, 2007 WL 2039590, at ¶ 1.
[68] *Id.* at ¶ 9.
[69] *Id.* at ¶ 6.
[70] *Id.* at ¶ 3.

> FN1. Mr. Treyes signed a Self Exclusion agreement with the OLGC on September 2, 2000. In this agreement OLGC contracted to use its best efforts to deny Mr. Treyes entry to all of OLGC's gaming venues in the province of Ontario. Contrary to the agreement Mr. Treyes was permitted access to Woodbine and Mohawk where he sustained the losses claimed in the Statement of Claim dated May 26, 2005.[72]
>
> ****
>
> The OLGC took the position that Mr. Treyes' claim was totally lacking in merit. It maintained that there was no precedent for a court imposing a duty of care on a gaming venue to find and exclude individuals who identify themselves as problem gamblers.[73]

The judge was impressed by the trial tactics of the plaintiff's lawyers (Hassan Fancy and Monica Chakravarti), and its expert witnesses.

> 10. Mr. (Hassan) Fancy and his colleagues used a new advocacy model called Demonstrative Advocacy (D.A. Model) to prove Mr. Treyes' claim. I agree with the point made by Ms. (Monica) Chakravarti that the D.A. Model goes a long way in constraining subjective interpretations, reducing acrimony and expediting settlement. The utilization of the D.A. Model demonstrated the state of Mr. Treyes' life before his addiction and diagnosis with Parkinson's disease. He was an electrical engineer and worked at Delphax Systems for over a decade. He was married and had one daughter. When the diagnosis of Parkinson's was initially made, his family was very supportive but matters became more difficult when he was forced to go on long-term disability and was withdrawn from his workplace due to the severity of the disease.[74]
>
> 11. Mr. Fancy and his colleagues extensively researched Mr. Treyes' pre-pathological gambling life. Lay and expert witnesses were identified. In 1999, he was diagnosed with pathological gambling. His treating neurologist, Dr. Guttman, whose report is contained in the record, confirmed this diagnosis. The firm also retained Dr. Williams of the Alberta Gaming Research Institute at the University of Lethbridge. He correlated pathological gambling and Parkinson's disease in his report dated April 18, 2007. He opined that the diseases are almost the mirror image of each other. I will mention one other expert, Mr. Sol Boxenbaum, a well-respected, independent anti-gambling consumer advocate. He is an expert on the issue of the OLGC's self-exclusion program. His report is dated June 10, 2007 and is contained in the record. He became familiar with the D.A. Model from reading the affidavits filed on behalf of Mr. Treyes in support of this motion. He stated that in all of his years as a consumer advocate in the gambling industry, he had never come across such an innovative methodology.[75]

It should be noted that the judge in the *Treyes* decision had referred to Sol Boxenbaum as a "well-respected, independent" expert. Boxenbaum, in December 2006 was "interested in recruiting someone from the Toronto area, who has asked for self-exclusion but has been allowed back into the venues operated by the OLGC. He's offering someone the opportunity to sue Ontario Lottery and Gaming. You will find his email address and telephone number in our Quebec section."[76] Boxenbaum also was a participant in class action litigation against Loto-Quebec and in the federal electronic gaming machines complaint filed by Chesley Crosbie, a Newfoundland lawyer.

Dicta in *Treyes*' conclusion may have resulted in creating conclusions that will be utilized by lawyers for self-excluded gamblers. This may be the result of three factors arising from *Treyes*. First, the judge concluded casinos have a duty of care to a self-excluded gambler. Second, *Treyes* accepted a new evidentiary standard "demonstrative advocacy."

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[71] *Id.* at ¶ 7.
[72] *Id.* at ¶ 5.
[73] *Id.*
[74] *Id.* at ¶ 10.
[75] *Id.* at ¶ 11.
[76] *Ontario*, CANADA'S GAMBLING WATCH NETWORK NEWSLETTER, (8) Dec. 4, 2006 (e-mailed newsletter).

Third, the judge indicated that Parkinson's disease was a factor that was relevant to casino liability.

First, the judge in dicta referred to "a recent and comprehensive article that the plaintiffs included as an exhibit on this motion: William V. Sasso and Jasminka Kalajdzic, Do Ontario and its Gaming Venues Owe a Duty of Care to Problem Gamblers? (2006) 10 *Gaming Law Review* at 552."[77] The judge heavily relied on this article in concluding gaming operators had a duty of care to compulsive gamblers. This dicta in *Treyes* might have opened the door to damage claims against a gaming operator by every self-excluded gambler. In fact his lawyer, Hassan Fancy, publicly solicited for self-excluded gamblers to sue casinos and has the following advertisement on Sol Boxenbaum's Web site[78] as of October 2007.

> FANCY BARRISTERS
>
> You can receive legal help to recover your losses from slots if you can say yes to all (3) of the following:
>
> a) You were treated for problem gambling;
>
> b) You signed OLGC's 'Self-Exclusion' Form at the casino; and
>
> c) You were still provided entry to OLGC's slot facilities and suffered losses.
>
> No fee without recovery.

Treyes' dicta clearly implied the duty of care issue was settled as a result of the article by William V. Sasso and Jasminka Kalajdzic, "Do Ontario and its Gaming Venues Owe a Duty of Care to Problem Gamblers?"[79]

In relying on Sasso and Kalajdzic, Treyes states:

> The article addresses many, if not all, of the issues that arise in cases such as this one including the Voluntary Self Exclusion Program undertaken by the OLGC, and the duty of care of gaming venues. The authors conclude at page 570:
>
> The ramifications of [*Edmonds v. Laplante* (15 March 2005, Toronto 02/CV226280 (Ont. S.C.J.)] remain to be seen. Will other courts, including appellate courts, follow *Edmonds*? What steps could the OLGC take to meet its duty of care? For the time being, at least one question has probably been answered by *Edmonds*: Do Ontario and its gaming venues owe a duty of care to problem gamblers? Under the current state of the law, the answer would appear to be "yes".
>
> The content and conclusions of this article are likely to have influenced [earlier] the confidential settlement of this action.[80]

The conclusion that the casino owed Treyes a duty of care flies in the face of every other case from a common law jurisdiction. Any indicia of a duty of care may be further eliminated by the revised self-exclusion form that clearly stresses that the obligation for exclusion is on the gambler alone. Perhaps the most bizarre conclusion by the *Treyes* case was that: "Pathologic gambling is heavily laden with stereotypes, the most notorious of which is the notion that a gambler is the author of his or her misfortune and displays a lack of willpower [Order at 3]."

This would eliminate the entire concept of individual responsibility.

The second result of *Treyes* is the emergence of a remarkably new doctrine which is a new legal discipline called Demonstrative Advocacy (D.A. Model[81]) The Web site of Fancy Barristers explains "our secret."

> The D.A. Model requires the visual definition of key textual evidence. This is done by integrating the textual evidence with the true visual conditions of that evidence to constrain subjective interpretations of the textual evidence. Words rarely have one meaning let alone an objective meaning.

The textual evidence summarizes "stereotypical" and judgmental words such as "problem gambler," "which must be shattered to allow receipt of the truth arising from the textual evidence. . . ."

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[77] *Id.* at ¶ 12–13; see decision on p. 48–49.
[78] <http://www.vivaconsulting.com/advocacy/35.html>.
[79] 10(6) Gaming L. Rev. 552 (2006).
[80] *Treyes v. OLGC*, , 2007 WL 2039590, at ¶ 12–13.
[81] <http://www.problemgamblerslawyer.com/secret.htm>.

Furthermore subjective interpretation of stereotypes "protract litigation because all counsel read the identical textual evidence but still hold completely different and often contradictory perspectives of the case. . . ."

It is suggested that this interpretation of the use of Demonstrative Advocacy would virtually eliminate centuries of common law. Textual evidence might have limited use on occasion but it is no substitution for cross-examination, and evaluation of the expertise and veracity of live witnesses by the trier of fact. It may be a resurrection of the Sophists who have long warned that advocacy might make the weaker argument seem to be the stronger.

Third, *Treyes* seems to hold the defendant gaming operators responsible for the acts resulting from Treyes' Parkinson's disease. This argument was attempted unsuccessfully in *Wells v. Smith Kline* and *Wynn Las Vegas*, (footnote 101 (see p. 52)) where a Parkinson's patient sued the drug manufacturer and seven casinos.

The major issue that was only tangentially addressed in *Treyes* is whether the casino should be liable in case it is negligent in failing to keep out self-excluded gamblers. This issue may have been resolved by the new self-exclusion form.

The revised Ontario casino "self-exclusion list and release" application *unlike* the one sited in *Treyes* states in relevant part:

Request to be Placed on the Self-Exclusion List and Release

> I request to be placed on the Ontario Lottery and Gaming Corporation's ("OLGC") list of self-excluded persons (the "List"). I acknowledge that it is *solely* my responsibility to refrain from visiting an OLGC gaming facility and gambling in the future . . . , and that it is *my* responsibility and decision whether or not to seek treatment or counseling.
>
> I understand that, as a result of being placed on the List, OLGC and the commercial casinos will, within a reasonable time period, remove me from their mailing lists. I understand, however, that I may receive marketing materials to the extent mailings have already been initiated and cannot be stopped. I understand that I will become ineligible to participate in any players' programs, and promotional offers. I confirm that I have either returned all players' cards in my possession or undertake to destroy them.
>
> I acknowledge and agree that OLGC, the private operators of OLGC gaming facilities, and their respective agents and employees have no *responsibility* or *obligation* to keep or prevent me from entering an OLGC gaming facility, to remove me should I enter, or to stop me from gambling.
>
> I confirm that this form constitutes written notice under the *Trespass to Property Act* that my entry onto an OLGC gaming facility is not permitted, and that I may be arrested and charged for trespass without further notice or warning should I enter an Ontario gaming facility.
>
> In consideration for being placed on the List, I agree to release and not to sue the Province of Ontario, the OLGC, all private operators of OLGC gaming facilities and their respective agents and employees, from and for any claims or causes of action that I have or may have arising out of any act or omission relating to the processing, implementation or enforcement of this request to be placed on the List, including the forwarding of the contents of this request to any OLGC gaming facility, private operator of such facilities, or their agents or employees, or for any financial loss, physical injury or emotional distress or breach of confidentiality that may occur as a result.
>
> I have read this Request to be Placed on the Self-Exclusion List and Release and understand all of its terms. I sign voluntarily and with full knowledge of its consequences and significance (emphasis added).[82]

While there is no required time period of exclusion, an individual desiring to end self-exclusion must submit a written request which will not be considered for six months. The individual must then complete a reinstatement form and then wait an addi-

[82] Adopted Jan. 5, 2005; two pages of explanatory information are attached to the self-exclusion form, including information such as "What Happens Next?"

tional 30 days.[83] There is also a mandatory re-entry meeting requirement for self-excluded gamblers who wish to have their names removed from the exclusion list. The OLG is also developing facial recognition technology that will make it easier to identify self-excluded gamblers.

The earlier form, utilized in *Treyes*, stated the OLGC and casino operators would use "best efforts to deny you entry"; that the OLGC and operators "accept no responsibility" in the event that you fail to comply with the ban; and that the self-excluded gambler would "release and forever discharge the OLGC and casinos from any liability." The revised form is much clearer as to the exculpatory language. Predictably, the *Treyes* dicta inspired a proliferation of anti-gambling litigants. In June 2008, Hassan Fancy and others filed a $3.5 billion class action lawsuit on behalf of 10,428 self-excluded problem gamblers who lost money gambling after signing self-exclusion forms between Dec. 1, 1999, and Feb. 10, 2005, when the new form was introduced.[84]

On March 27, 2009, plaintiffs filed an amended statement of claim.[85] Class A members, as represented by Peter Dennis, requested general damages of $1 billion, special damages of $1 billion, damages for breach of contract of $2 billion, and punitive damages of $1 billion. Plaintiff's complaint alleged: "(a) Approximately 48% of the total revenue generated each year at the Gambling Venues would be derived from problem gamblers engaging in the Gambling Activities"[86] and that "the operation of the Gambling Venues was an inherently dangerous activity for its customers, requiring the OLGC to take special precautions to prevent injury to such customers."[87]

The gravamen of the complaint was that OLGC realized the extent of problem gambling and undertook a duty to enforce a self-exclusion policy by entering "into a binding contract"[88] with the problem gambler to deny entry to the self-excluded person. The OLGC breached its duty by relying solely on "memory based enforcement"[89] by employees and failed to utilize measures such as "'carding' using photo-identification and other approaches and technologies reasonably available to the OLGC, some of which were already in use to identify, monitor, deny entry to and/or exclude 'cheaters,' customers engaging in behaviours capable of overcoming the 'House Edge' and under-age customers from the Gambling Venues and for other purposes."[90]

A class action suit was also filed on behalf of Gerard Schick against Boehringer Ingelheim and Pfizer on May 5, 2005.[91] The complaint alleges defendants were negligent and that there was a significant risk of adverse impacts by distributing Mirapex, which "has long been associated with compulsive/obsessive behavior, including compulsive/obsessive gambling, and has been identified as a cause for these behaviours in users."[92] The complaint further alleged: "Soon after beginning to take Mirapex, Gerard Schick developed a compulsive, obsessive gambling addiction. He gambled indiscriminately and relentlessly."[93] The complaint seeks general damages of $3 million per plaintiff and $50 million in punitive damages. According to one of plaintiff's lawyers, the litigation is still at an early stage.[94]

Quebec

The most significant lawsuit is the class action litigation in Quebec initiated on May 18, 2001,[95] by Jean Brochu against Loto-Quebec. Brochu, a lawyer, had embezzled $50,000 from his employer and he blamed the VLT's for his addiction. Unlike other litigants, Brochu received about $150,000 "in provincial court funding."[96] On May 6, 2002, the Quebec Court authorized a $700 million class action (money damages of $578 million and $119 million exemplary). The suit may include "any person who, since June 1993, (until

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[83] Self-Exclusion fact sheet OLGC July, 2004. At the Self-Exclusion Conference in Toronto, ("Perspectives on Self-Exclusion," October 23–24, 2007) compulsive gamblers and experts opined that a compulsive gambler might not sign any form if it was for a time period longer than 6 months.

[84] *The Big Bluff*, supra note 54; *Problem Gambler Suing OLC for $3.5 Billion*, Toronto Star, Apr. 8, 2009.

[85] Peter Dennis and OLGC, CV08356378.

[86] *Id.* at ¶ 29(a).

[87] *Id.* at ¶ 29(m).

[88] *Id.* at ¶ 38(a).

[89] *Id.* at ¶ 45, ¶ 49(c).

[90] *Id.* at ¶ 48(d).

[91] Complaint, 05 CV288851CV.

[92] *Id.* at ¶ 20.

[93] *Id.* at ¶ 31.

[94] Telephone interview with Darcy R. Merkur of Thomson ,Rogers, plaintiff's law firm, July 6, 2009.

[95] No. 200-06-00017-015.

[96] <http://www.canadianlawyermag.com>, Feb. 2002, at 12; Fonds d'aide aux recours collectifs. Additional funding was allowed for the payment of expert testimony; telephone interview with Roger Garneau, attorney for Brochu, Jan. 20, 2005.

May 30, 2007) became a compulsive gambler by using video lottery terminals that were put at their disposal and kept in clubs, bars and other public sites by Loto-Quebec."[97]

After considerable discovery, the trial commenced on September 15, 2008. The plaintiff has also filed detailed expert witness reports.[98] The plaintiff's law firm will also be utilizing the expertise of two retired judges.[99] Loto-Quebec has impleaded two manufacturers of gaming equipment as defendants, claiming it was their responsibility to install various warning devices.[100] The plaintiff is not seeking recovery of gambling losses. Loto-Quebec has generally denied the allegations in the *Brochu* complaint, stressing that is has taken adequate preventive measures.[101] As of April 2009, plaintiff finished its presentation and the defendants will now present evidence. The proceeding may last until November 2010.

Newfoundland and Nova Scotia

On April 20, 2007, Ches Crosbie Barristers filed a Statement of Claim on behalf of the Estate of Susan Piercey against the Atlantic Lottery Corporation [102] seeking class action status.
The Statement claims:

> 12 . . . VLT's are inherently deceptive, inherently addictive and inherently dangerous when used as intended.
>
> ****
>
> 18. Like loaded dice, VLT's combine randomness with concealed asymmetry to cheat the player. The virtual reels are programmed to generate an abundance of randomized near misses.

When the class action complaint was dismissed on grounds of sovereign immunity, Crosbie filed a new complaint in March 2009 alleging a violation of the Canadian Charter of Rights and Freedoms.

In Nova Scotia, Paul Burrell, who claimed he lost $500,000 at Casino Nova Scotia, presently has a civil action before the Supreme Court of Nova Scotia. His case may be assisted by an ombudsman's 13 page final report which found casino staff "rarely removed people who appear to be addicted to gambling, as required by law." The report recommended:

> the province . . . ensure casinos have proper policies in place, including a regularly updated "comprehensive training program" to help staff identify apparent problem gamblers. . . . The report stresses casinos have a "duty" to stop people who appear to be addicted to gambling from playing games of chance.
>
> It also found casino policy at the time of Burrell's complaint "relied primarily on self-identification," in which players identify themselves as problem gamblers. They can then make a written request to be refused access to the casinos.
>
> It did not deal, in a meaningful way, with staff identifying an individual exhibiting behavior evidencing a problem with gambling.

The report also stated there were only 8 cases where staff concerns resulted in exclusion of problem gamblers and 181 cases mostly of self-exclusion.

Burrell claimed the casino breached a duty by failing to identify him as a problem gambler. His earlier complaint against the provincial Alcohol and Gaming Division was dismissed in 2004.[103]

CONCLUSION

A casino operator should use a form similar to the revised self-exclusion form of the OLG, which

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[97] Judgment, ¶ 1; On Feb. 21, 2003, the Quebec Court of Appeal rejected Loto-Quebec's attempt to contest the $119 million sought as exemplary damages. On Mar. 14, 2007, the court set May 30, 2007 as the cut-off date for compulsive gamblers to become part of the class.

[98] See *Rapport Professionne* by Jean-Charles Chebat, Ph.D., filed with the court on Mar. 16, 2007, and *Evaluation de L'Information Donnee par le Gouvernment du Quebec, aux Utilisateurs des Appareils de Lotterie Video* by Jean Leblond, Ph.D., filed Mar. 22, 2007.

[99] Viva Consulting Family Life, Inc., <http://www.vivaconsulting.com/newsflasharchive.html>.

[100] WMS Gaming Inc. and Video Lottery Consultants Inc. (which is a subsidiary of International Game Technology); Spielo Manufacturing Inc, (New Brunswick) intervened as a defendant.

[101] Answer of Loto-Quebec, Feb. 2, 2007.

[102] 2007, 01 T 1711 CP.

[103] *N.S. takes steps to deal with problem gamblers at casinos; Gaming Province accepts ombudsman's recommendations*, TELEGRAPH-JOURNAL (New Brunswick), August 1, 2007.

has made it more difficult for a self-excluded gambler to sue the gaming operator. The exculpatory language is clearer and the "best efforts" obligation by the operator has been eliminated. The form could be improved by the use of italics and requiring the patron to initial the exculpatory language. It might also be advantageous to follow the recommendation of Dr. Lia Nower whereby the self-excluded gambler would have to inform the gaming operator of every violation of self-exclusion.

Nonetheless, the *Treyes* decision has created difficulty in that it basically relieves the compulsive gambler from responsibility. *Treyes* also suggested the operators have a duty of care and that the original exculpatory "release" of liability may be unenforceable. More troubling is the utilization of "Demonstrative Advocacy" which basically concludes that documentary files may be preferable to an evidentiary hearing of witnesses. Finally, *Treyes* may open litigation floodgates to any gambler who can allege the pill made me do it. Yet all other common law jurisdictions have concluded the self-exclusion form shields the operator except for intentional misfeasance. Thus it may be time to litigate since the alternative of mediating every one of the future lawsuits brought by Fancy Barristers may result in almost unlimited payments to the self-excluded. It is possible that the *Treyes* dicta will be utilized not only by compulsive gamblers in other Canadian provinces or territories, but also in other countries.