NOVA SCOTIA COURT OF APPEAL
Citation: ***Burrell v. Metropolitan Entertainment Group***,
2011 NSCA 108

Date: 20111202
Docket: CA 339865
Registry: Halifax

Between:

Harold Paul Burrell

Appellant

v.

Metropolitan Entertainment Group, a registered partnership; The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia; and Nova Scotia Gaming Corporation

Respondents

Judges:	Saunders, Fichaud, Bryson, JJ.A.
Appeal Heard:	September 21, 2011, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs per reasons for judgment of Fichaud, J.A., Saunders and Bryson, JJ.A. concurring
Counsel:	Kent McNally, for the appellant Carl Holm, Q.C., for the respondent Metropolitan Entertainment Group Duane Eddy, for the respondents the Attorney General of Nova Scotia and Nova Scotia Gaming Corporation

Reasons for judgment:

[1] Mr. Burrell, a gambling addict, sues the operator and government regulators of the Sydney Casino for negligence. He claims they owed him a duty of care to minimize his gambling activity and, by not doing so, became liable for his gambling losses, consequential and punitive damages. A judge of the Supreme Court granted the defendants' motion for summary judgment on the pleadings and dismissed Mr. Burrell's action. Mr. Burrell appeals. The issue is whether Mr. Burrell's Amended Statement of Claim discloses a cause of action and, in particular, whether his pleaded allegations support the existence of a duty of care by the Casino operator and public regulators.

Background

[2] This is an appeal from a motion for summary judgment on the pleadings under *Rule* 13.03. There was no motion for summary judgment on the evidence under *Rule* 13.04. Following the practice on a motion for summary judgment on the pleadings, I will assume, without finding, that Mr. Burrell's pleaded allegations are factual.

[3] In 1994 Nova Scotia enacted the *Gaming Control Act*, S.N.S. 1994-95, c. 4. The *Act* regulates gambling in casinos, and establishes the Nova Scotia Gaming Corporation ("Corporation") as a provincial crown corporation to manage casinos in the Province. The Corporation has an Agreement with the Metropolitan Entertainment Group ("Metropolitan") under which Metropolitan operates casinos, including Casino Nova Scotia Sydney ("Casino").

[4] Mr. Burrell began to attend the Casino in 1995 and, he says, became addicted to gambling. He attended consistently between 2000 and 2003, and became known to Casino staff. In early 2004 Mr. Burrell notified the Casino that he was wasting too much money there. In response, Metropolitan served Mr. Burrell with a Notice to stay away from the Casino further to the *Protection of Property Act*, R.S.N.S. 1989, c. 363. Section 3(1)(e) of that statute says that anyone who, without justification, "enters on premises where entry is prohibited by notice" is guilty of an offence. Metropolitan's Notice to Mr. Burrell was renewed every six months thereafter.

[5] Only once, after these Notices began, did Mr. Burrell gain access to the Casino. Mr. Burrell's Answer to the Demand for Particulars describes that occasion:

> The access consisted of attending the Casino in January and spending approximately $700.00. The Plaintiff won a jackpot prize and had to speak to the staff regarding same. Approximately 45 minutes later, the Plaintiff was confronted by security and told that he would have to leave the building.

[6] Over the years from 1995, mostly from 2000 to 2003, Mr. Burrell lost over $500,000 at the Casino. As a result, he defaulted on his mortgage and lost his home to foreclosure.

[7] Mr. Burrell sued the Attorney General, representing Her Majesty the Queen in right of the Province ("Province"), the Corporation and Metropolitan for negligence in allowing him to continue gambling after they knew or reasonably should have known that he was addicted to gambling.

[8] The Province and Corporation moved in the Supreme Court of Nova Scotia under *Rule* 13.03 to dismiss the action against all the defendants, including Metropolitan, whom the Notice of Motion describes as an agent of the Crown defendants. *Rules* 13.03(1)(a) and (c) and 13.03(3) say:

> **Summary judgment on pleadings**
>
> 13.03(1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> ...
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.
>
> ...
>
> (3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[9] On September 28, 2010, Justice John Murphy heard the motion. The judge gave an oral decision on October 8, 2010, and issued written reasons on January 13, 2011 (2010 NSSC 476). The judge allowed the motion for summary judgment on the pleadings and dismissed Mr. Burrell's action against all the defendants. The judge concluded that there was no duty of care, at common law or by statute, and that Mr. Burrell's claims disclosed no cause of action.

[10] Mr. Burrell appeals to this Court.

Issues and Standard of Review

[11] Mr. Burrell says that the judge erred by ruling that there was no duty of care. He submits there was a duty either by statute or common law. This is an issue of law. The facts are not in question in this appeal from a motion for summary judgment on the pleadings.

[12] On an appeal from a summary judgment ruling, the Court of Appeal will intervene only if the chambers judge's decision shows an error in law or would cause a patent injustice: *Maritime Travel Inc. v. Go Travel Direct.Com. Inc.*, 2007 NSCA 11, para 3 and authorities there cited. If there was no duty of care, then the claim is unsustainable and is dismissible on interlocutory motion: *e.g. Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83, at paras 19-21. The dismissal of a plaintiff's claim as a result of an error in law would be a patent injustice. So I will apply a correctness standard to review the judge's decision for an error of law.

Mr. Burrell's Position

[13] Mr. Burrell's claim pivots on the legislated duties in the *Gaming Control Act* and in Regulation 20(1)(c) of the *Casino Regulations*, O.I.C. 95-259, N.S. Reg. 40/95, under that statute.

[14] The *Act* says:

> 2. The purpose of this Act is to
>
> ...

> (c) ensure that any measures taken with respect to casinos and other lottery schemes are undertaken for the public good and in the best interests of the public and, without limiting the generality of the foregoing, to minimize the opportunities that give rise to problem gambling and other illnesses, crime and social disruption.
>
> ...
>
> 7. The Minister has the general supervision and management of this Part.
>
> 8. There is hereby established a body corporate to be known as the Nova Scotia Gaming Corporation.
>
> 9. The Corporation is for all purposes of this Act an agent of Her Majesty in right of the Province and the powers of the Corporation may only be exercised as such an agent.
>
> ...
>
> 24(1) The Corporation shall
>
> (b) conduct and manage casinos and other lottery schemes in accordance with this Act and the regulations and the Criminal Code (Canada).

[15] During the period pertinent to Mr. Burrell's action, the *Casino Regulations* said:

> 20(1) No casino operator shall permit the following individuals to play games of chance in a casino:
>
> > (c) individuals who appear to be addicted to gambling, and the casino operator shall implement policies and procedures designed to identify individuals exhibiting behaviour evidencing a problem with gambling.

Regulation 20(1)(c) was repealed after the relevant dates for Mr. Burrell's claim: O.I.C. 2011-218, N.S. Reg. 214/2011.

[16] Mr. Burrell says that Metropolitan knew or reasonably should have known that Mr. Burrell was addicted to gambling, and by Regulation 20(1)(c) had a

legislated duty to not permit him to gamble. He alleges that the Corporation, as agent for the Province, failed in its statutory duty under s. 24(1) to conduct and manage the Casino in accordance with regulation 20(1)(c). He submits that Metropolitan, the Corporation and the Province as the Corporation's principal, each had a duty of care, by statute or common law, that is sufficient to survive this summary judgment motion.

Statutory Duty

[17] The judge (para 18) relied on *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, to conclude that Mr. Burrell was owed no duty of care based on breach of legislation *per se*. I agree with that conclusion.

[18] In *Saskatchewan Wheat Pool*, pp. 227-8, Justice Dickson, as he then was, for the Court, canvassed the English, American and Canadian authorities, then said:

> In sum I conclude that:
>
> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
>
> 2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
>
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
>
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

[19] Since *Saskatchewan Wheat Pool*, the tortious aspect of a statutory breach must be examined through the lens of the common law's duty of care.

Common Law Duty - General Principles

[20] I will summarize the general principles that govern whether there is a duty of care at common law.

[21] In *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), at p. 751, Lord Wilberforce set out a two stage test. First, do the defendant and plaintiff have "a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises"? Second, if the first question is answered Yes, are there considerations that should negate or reduce the scope of the duty, the class of persons to whom it is owed or the recoverable damages?

[22] In England, the *Anns* two stage test has been replaced by a three stage test that examines foreseeability, proximity and whether a duty of care is fair, just and reasonable in the circumstances: *Caparo Industries plc v. Dickman*, [1990] 2 A.C. 605 (H.L.), at pp. 617-18.

[23] In Canada, *Anns* retains its formal standing, but with significant retouching that highlights the same three elements.

[24] In *Cooper v. Hobart*, [2001] 3 S.C.R. 537, Chief Justice McLachlin and Justice Major for the Court described a two stage test, but identified foreseeability and proximity as components of the first stage:

> 30. In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are

> residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. [Supreme Court underlining]

[25] In *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, Chief Justice McLachlin and Justice Major for the Court clearly separated foreseeability and proximity as independent components of the first stage:

> 9. 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 the 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 recognized. If no such cases exist, the question then becomes whether a new duty of care should be recognized 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. Factors giving rise to proximity must be grounded in the governing statute when there is one, as in the present case.
>
> 10. If the plaintiff is successful at the first stage of *Anns* such that a *prima facie* duty of care has been established (despite the fact that the proposed duty does not fall within an already recognized category of recovery), the second stage of the *Anns* test must be addressed. That question is whether there exist residual policy considerations which justify denying liability. Residual policy considerations include, among other things, the effect of recognizing that duty of care on other legal obligations, its impact on the legal system and, in a less precise but important consideration, the effect of imposing liability on society in general.

[26] In *Syl Apps*, Justice Abella for the Court succinctly summarized the overall approach:

> 34. Accordingly, in order to establish that the Syl Apps Secure Treatment Centre and Mr. Baptiste owed the family of R.D. a duty of care, (1) the harm complained of must have been reasonably foreseeable, (2) there must have been sufficient proximity between them and the family such that it would be fair and just to impose a duty of care, and (3) there must be no residual policy reasons for declining to impose such a duty.

To similar effect: *Fullowka v. Pinkerton's of Canada Ltd.,* [2010] 1 S.C.R. 132, at para 18, per Cromwell J. for the Court.

[27] In *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, Chief Justice McLachlin for the Court (para 15) said that "where a case is like another case where a duty has been recognized, one may usually infer that sufficient proximity is present and that if the risk of injury was foreseeable, a *prima facie* duty of care will arise". The Chief Justice also discussed the burden:

> 13. The plaintiff bears the ultimate legal burden of establishing a valid cause of action, and hence a duty of care: *Odhavji* [*Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263]. However, once the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.

[28] In *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, Chief Justice McLachlin elaborated on the proximity analysis:

> 23. However, as acknowledged in *Donoghue* and affirmed by this Court in *Cooper*, foreseeability alone is not enough to establish the required relationship. To impose a duty of care "there must also be a close and direct relationship of proximity or neighbourhood": *Cooper*, at para. 22. The proximity inquiry asks whether the case discloses factors which show that the relationship between the plaintiff and the defendant was sufficiently close to give rise to a legal duty of care. The focus is on the relationship between alleged wrongdoer and victim: is the relationship one where the imposition of legal liability for the wrongdoer's actions is appropriate?
>
> 24. Generally speaking, the proximity analysis involves examining the relationship at issue, considering factors such as expectations, representations, reliance and property or other interests involved: *Cooper*, at para. 34. Different relationships raise different considerations. "The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic": *Cooper*, at para. 35. No single rule, factor or definitive list of factors can be applied in every case. "Proximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (*Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151, cited in *Cooper*, at para. 35).

[29] In *Syl Apps*, Justice Abella expanded on the policy considerations at play in the proximity component of the first stage and in the second stage of the Canadian version of the *Anns* tests:

> 31. If a *prima facie* duty of care is found to exist based on reasonable foreseeability and proximity, it is still necessary for a court to submit this preliminary conclusion to an examination about whether there are any residual policy reasons which make the imposition of a duty of care unwise. As noted in *Cooper*, "the *Donoghue v. Stevenson* foreseeability-negligence test, no matter how it is phrased, conceals a balancing of interests. The quest for the right balance is in reality a quest for prudent policy" (para. 29).
>
> 32. This means, the Court recognized, that policy is relevant at both the "proximity" stage and the "residual policy concerns" stage of the *Anns* test. The difference is that under proximity, the relevant questions of policy relate to factors arising from the particular relationship between the plaintiff and the defendant. In contrast, residual policy considerations are concerned not so much with "the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Cooper,* at para. 37).
>
> 33. The possibility of some blending of policy considerations was noted by McLachlin C.J. and Major J. in *Cooper*:
>
> > Provided the proper balancing of the factors relevant to a duty of care are considered, it may not matter, so far as a particular case is concerned, at which "stage" [policy is considered]. The underlying question is whether a duty of care should be imposed, taking into account all relevant factors disclosed by the circumstances. [para. 27]

[30] I will apply these principles to Mr. Burrell's appeal.

Common Law Duty - Application of Principles

[31] Clearly it is reasonably foreseeable that gamblers will lose money. So the existence of a *prima facie* duty of care turns on the proximity analysis.

[32] The decision in *Cooper* identified the governing legislation as the focus of the proximity inquiry for a duty of care owed in the exercise of statutory powers:

> 43. In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.
>
> 44. In this case, the statute does not impose a duty of care on the Registrar to investors with mortgage brokers regulated by the Act. The Registrar's duty is rather to the public as a whole. Indeed, a duty to individual investors would potentially conflict with the Registrar's overarching duty to the public.

Similarly, in *Syl Apps*, Justice Abella said:

> 27. When the relationship occurs in the context of a statutory scheme, the governing statute is a relevant context for assessing the sufficiency of the proximity between the parties (*Cooper*, at para. 43; *Edwards*, at para. 9). As this Court said in *Edwards*: "Factors giving rise to proximity must be grounded in the governing statute when there is one" (para. 9).

[33] The factors that determine proximity between Mr. Burrell and these defendants should be grounded in the *Gaming Control Act.* The *Act* and its regulations do not prescribe a civil remedy for noncompliance with the legislated standards.

[34] Sections 102 - 118 of the *Act*, titled "Investigation and Enforcement", include an "administrative penalty":

> 115. Where the Commission or Executive Director, after hearing, determines that a person has contravened a provision of this Act or of the regulations or a term or condition of a registration, and considers it to be in the public interest to make the order, the Commission or Executive Director may order the person to pay the Commission an administrative penalty of not more than five thousand dollars in the case of a person other than a corporation and not more than fifty thousand dollars in the case of a corporation.

[35] Sections 121, 122, 123(1) and (2) and 124 prescribe offences and penalties for prohibited gambling in a casino, prohibited access to a casino and noncompliance with the Regulations:

Person prohibited from playing in casino

121(1) Every person who is prohibited from playing a game of chance in a casino who plays a game of chance in a casino is guilty of an offence.

(2) Every operator of a casino who knowingly permits a person who is prohibited from playing a game of chance in a casino to play a game of chance in a casino is guilty of an offence.

Person prohibited from access to casino

122(1) Every person who is prohibited from access to any casino who enters a casino is guilty of an offence.

(2) Every operator who knowingly permits a person who is prohibited from access to any casino to enter or remain in a casino is guilty of an offence.

Penalties respecting Sections 119 to 122

123(1) Every person convicted of an offence under Section 119, other than with respect to subsection 67(2) or Section 85 or 86, or under Section 120 is liable on summary conviction to

(a) in the case of a person other than a corporation, a fine of not more than twenty-five thousand dollars or to imprisonment for not more than one year, or to both fine and imprisonment; or

(b) in the case of a corporation, a fine of not more than five hundred thousand dollars.

(2) Every person convicted of an offence ... under Section 121 or 122 is liable on summary conviction to

(a) in the case of a person other than a corporation, a fine of not more than five thousand dollars or to imprisonment for not more than two months, or to both fine and imprisonment; or

(b) in the case of a corporation, a fine of not more than fifty thousand dollars.

> **Contravention of regulations**
>
> 124 Every person who contravenes or fails to comply with the regulations is guilty of an offence and liable on summary conviction to the penalty set out in subsection 123(1) except where the regulations provide for a lesser penalty.

[36] The premise for the offences in ss. 121 and 122 is instructive. The activity is punishable only when a "person who is prohibited from playing a game of chance in a casino" plays, or a "person who is prohibited from access to any casino" gains access. The legal sanction is conditioned on the pre-existence of a prohibition.

[37] Also noteworthy is the reciprocal legal responsibility in ss. 121-22. The gambler who violated the prohibition and the operator who knowingly permitted the violation each are subject to the same penalty.

[38] Regulation 252(1)(e) of the *Casino Regulations* under the *Gaming Control Act* establishes the option of self-exclusion by an individual who is concerned about his gambling habit:

> 252(1) The following are prescribed as criteria for refusing an individual access to a casino or to have an individual removed from a casino:
>
> (e) the individual requests in writing to the Corporation, Commission or casino operator that that individual be refused access to the casino;

A self-excluded individual cannot just enter the casino, say he has changed his mind, then take a seat at the blackjack table. The legislation shields him from his own caprice. Regulation 252(3) says:

> 252(3) The individual referred to in clause (1)(e) may request reinstatement upon sufficient evidence and reasons for reinstatement being supplied to the Commission at a hearing requested by the individual.

See *Upshaw v. Nova Scotia (Utility and Review Board)*, 2008 NSCA 88.

[39] The legislation fixes a standard that balances the autonomy and responsibility of the individual, who chooses whether to gamble, with the recognition that gambling addiction hobbles that individual's freedom of choice.

An individual who is concerned that his gambling habit is out of control is responsible to request that the operator or regulators refuse him access to the Casino. In Mr. Burrell's case, that request led to a prohibition notice under the *Protection of Property Act*. Then, if the operator knowingly permits that prohibited individual to have access or play a game of chance, the operator and individual share the accountability for legal sanctions.

[40] This is a case where it is said the defendants owed the plaintiff a duty of care to protect the plaintiff from the plaintiff's chosen conduct. The proximity analysis attaches significance to the plaintiff's autonomy. In *Childs*, the Chief Justice said:

> 31 ... However, where the conduct alleged against the defendant is a *failure to act*, foreseeability alone may not establish a duty of care. In the absence of an overt act on the part of the defendant, the nature of the relationship must be examined to determine whether there is a nexus between the parties. Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. ...
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> ...
>
> 34 A positive duty of care may exist if foreseeability of harm is present *and* if other aspects of the relationship between the plaintiff and the defendant establish a special link or proximity. Three such situations have been identified by the courts. ...
>
> 35 The first situation where courts have imposed a positive duty to act is where a defendant intentionally attracts and invites third parties to an inherent and obvious risk that he or she has created or controls: ...
>
> 36 The second situation where a positive duty of care has been held to exist concerns paternalistic relationships of supervision and control, such as those of parent-child or teacher-student: ...
>
> 37 The third situation where a duty of care may include the need to take positive steps concerns defendants who either exercise a public function or engage in a commercial enterprise that includes implied responsibilities to the public at large: ...
>
> 38 Running through all of these situations is the defendant's material implication in the creation of risk or his or her control of a risk to which others have been invited. ...

> 39 Also running through the examples is a concern for the autonomy of the persons affected by the positive action proposed. The law does not impose a duty to eliminate risk. It accepts that competent people have the right to engage in risky activities. Conversely, it permits third parties witnessing risk to decide not to become rescuers or otherwise intervene. It is only when these third parties have a special relationship to the person in danger or a material role in the creation or management of the risk that the law may impinge on autonomy. ... The autonomy of risk takers or putative rescuers is not absolutely protected, but, at common law, it is always respected. [Chief Justice's italics]

See also *Fullowka*, para 27.

[41] Mr. Burrell's responsibility for his autonomous choice weighs in the scale of the proximity analysis. So does the Casino operator's promotion of gaming, which may have helped to attract Mr. Burrell. The defendant's invitation to participate in the risky behaviour is a factor under *Childs*' first exception (para 35). Mr. Burrell's autonomy is not absolutely protected, but is respected in relative terms.

[42] The Legislature has balanced those factors and selected a relative model for legal sanctions that is premised on: (1) the pre-existence of a prohibition on either access to the Casino or participation in gaming, (2) an opportunity to the individual, who is concerned about his gambling habit, to self-exclude by requesting such a prohibition, and (3) bilateral responsibility of both the individual and the operator who knowingly permits the contravention of that prohibition.

[43] The Legislature's chosen balance has a rational basis. Without a prohibition, the casino could not reliably distinguish a gambling addict from a frequent gambler. With a prohibition in place, the clear rule is known to the individual and casino - This person shall have no opportunity to gamble. Mr. Burrell's elastic proposition, on the other hand, would let him test the tables and keep his winnings, if any, but recover any deficit in a tort claim akin to gambling loss insurance.

[44] As stated in *Edwards*, *Syl Apps* and *Cooper* (above paras 25, 32), "[f]actors giving rise to proximity must be grounded in the governing statute when there is one". The *Gaming Control Act*'s pre-conditions for legal sanctions are compelling postulates in the proximity analysis for the duty of care.

[45] Mr. Burrell's losses occurred before he requested exclusion, before Metropolitan gave Mr. Burrell the Notice that barred Mr. Burrell's entry under the *Protection of Property Act,* and before there was any prohibition of Mr. Burrell's access to the Casino. After the Notices began under the *Protection of Property Act*, Mr. Burrell obtained access only once, won a jackpot, then was removed by Casino security staff immediately after they learned of his presence. The premise for legal sanctions expressed by the *Gaming Control Act* - in which any duty of care should be rooted - is missing from Mr. Burrell's claim.

[46] It is true that, from 1995 onward, Metropolitan promoted the Casino's activities and advertised to the public. Though Mr. Burrell was not specifically targeted, he says that even general advertising was an invitation to the public to engage in financially risky behaviour, and this arguably might support a *prima facie* duty of care under the first exception in *Childs* (para 35).

[47] If this is so, any *prima facie* duty of care must still survive the second stage of the *Anns* test. In *Cooper*, the Chief Justice and Justice Major, for the Court, discussed *Anns*' second stage:

> 38 It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. 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. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test.

[48] Insofar as the Casino's promotional activity invited the public to engage in financial risk and supported a *prima facie* duty of care under *Childs*' first exception, in my view any *prima facie* duty dissipated at the second stage of the *Anns* analysis. The Government made a policy decision, embodied in the *Gaming Control Act* and its regulations, to permit gambling in casinos. The promotion of the Casino generally to the public, not individually targeting Mr. Burrell, is a direct and natural consequence of that policy decision. It is not for the courts to second guess that policy choice via tort law.

[49] The case authorities that discuss whether problem gamblers are owed a duty of care support the conclusions I have deduced from the *Gaming Control Act*.

[50] In *Calvert v. William Hill Credit Ltd.*, [2008] EWHC 454 (Ch. Div.), affirmed [2008] EWCA Civ 1427 (Eng. C.A.) [without discussing the duty of care in the Court of Appeal], Justice Briggs of the High Court of Justice - Chancery Division described the issue:

> 1. This case raises, for the first time in an English court, the question whether there are any circumstances in which a bookmaker can 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] Justice Briggs accepted that the defendant had a duty of care to enforce the prohibition on gambling that the defendant had given at the plaintiff's request. The judge noted (paras 175-87) that the defendant had voluntarily assumed the responsibility, that the defendant knew the plaintiff suffered from a psychiatric disorder, and there was no risk of liability to an indeterminate class given the condition that the plaintiff and defendant had agreed to the plaintiff's exclusion.

[52] Justice Briggs rejected the existence of a broader duty of care to problem gamblers generally, who had not requested exclusion and for whom there was no specific prohibition arrangement in place. Citing *Reeves v. Commissioner of Police*, [2000] 1 A.C. 360 (H.L.), at p. 368 the judge said "the recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses involves a journey to the outermost reaches of the tort of negligence, to the realm of the truly exceptional". Justice Briggs continued:

> 146. ... the prime cause of the claimant's loss, whether psychiatric or financial, was his own decision during the second half of 2006 to continue his gambling; i.e. self-inflicted loss. In such a context, as the citation from *Reeves v. Commissioner of Police* at the beginning of this judgment makes clear, the starting point is that the law imposes no general duty upon a person to prevent his neighbour from harming himself. As Lord Hoffmann put it:

> "It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions."
>
> 147. In all the cases where such a duty has been identified, there have been found to be special circumstances which justify a departure from that general rule.
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> ...
>
> 172. ...Again, I emphasise that the broad submission advanced by Miss Day assumes a duty of care to all problem gambler customers, regardless whether they seek the bookmaker's help. Such a duty would, in relation to a problem gambler who did not seek the bookmaker's help, be an invasion of his autonomy, in relation to an activity for which he is primarily responsible for the consequences.
>
> 173. Nor does it seem to me that it would be fair to impose the broad duty of care for which Miss Day contends. As Mr Fenwick submitted, it would place a burden on the bookmaker pursuant to which the problem gambler could freely take home his profits, but look to the bookmaker for the return of his losses, without even seeking the bookmaker's assistance to help him control his gambling.

[53] In *Dennis v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 1332, the Ontario Superior Court of Justice dismissed a motion to certify a class action against a provincial gaming corporation by persons who had signed self-exclusion forms. Justice Cullity held that the claims were better framed as individual actions than as a class action. In the course of her ruling she discussed whether there was a duty of care. After noting the absence of Canadian authority on point, Justice Cullity (paras 113-28) referred with approval to Justice Briggs' decision in *Calvert*. Justice Cullity (para 136) accepted that there was a duty of care because "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". She recited that, in *Calvert*, Justice Briggs had rejected the existence of a duty of care owed generally to problem gamblers -*ie.* those who had not signed self exclusion forms. Justice Cullity then said (para 119):

> 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.

[54] In *Calvert*, Justice Briggs (paras 152-162) referred to Australian decisions that rejected the notion of a broad duty of care to problem gamblers: *Reynolds v. Katoomba RSL All Services Club Ltd.*, [2001] NSWCA 234, paras 27, 44-49, 125-27, 143-52; *Foroughi v. Star City Pty Limited.*, [2007] FCA 1503, paras 121-27. To similar effect: *Politarhis and Anor v. Westpac Banking Corporation*, [2009] SASC 96, at para 118. Reynolds, the leading case, emphasized the individual's autonomous decision to gamble.

[55] In *Taveras v. Resorts Int'l Hotel, Inc.*, 2008 U.S. Dist. LEXIS 71670 the District Court of New Jersey struck the plaintiff's negligence claim against a casino operator for inducing the plaintiff to gamble. The District Court judge said:

> Plaintiff does not point to any authority in support of this strained understanding of casinos' common-law duties. In fact, the great weight of authority supports Defendants' position that common-law tort principles do not require casinos to rescue compulsive gamblers from themselves. [citations omitted]

[56] Mr. Burrell's losses precede his request for exclusion and the prohibition notice under the *Protection of Property Act*. His claim asserts the existence of the broad duty of care that was rejected in *Calvert*, was not considered in *Dennis*, and is unsupported by the Australian and American cases. Mr. Burrell cites no authority that has accepted a duty of care to problem gamblers who have neither self-excluded nor been lured by individually targeted promotion.

[57] In my view, Mr. Burrell was not owed a duty of care by Metropolitan, the Corporation or the Province with respect to Mr. Burrell's gambling losses.

Conclusion

[58] I would dismiss the appeal. I would order Mr. Burrell to pay costs for the appeal of $1,000 to Metropolitan and $1,000 to the Corporation and the Province, for a total of $2,000 costs, inclusive of disbursements.

Fichaud, J.A.

Concurred: Saunders, J.A.

Bryson, J.A.