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June 16, 2016

Plaintffs Hit The Jackpot at the Ontario Court of Appeal

At the risk of stating the obvious, gambling is unpredictable. Most people would agree that law is different. We think of law as being a predictable discipline governed by rules. Or at least we want to think that it is. A recent decision of the Ontario Court of Appeal—one that fittingly involves gambling— reminds us, however that predictability is not the only principle that courts value.

In *Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford)*, a majority of the Ontario Court of Appeal allowed an appeal from a motions judge's decision striking a statement of claim in a "problem gambler" civil claim. In doing so, the Court appears to have opened the door to expanding significantly the scope of recovery for causes of action based upon knowing receipt, unjust enrichment, and simple negligence.

The wrinkle in this case is that the plaintiffs were third parties from whom the alleged problem gambler, a law clerk, stole funds to perpetuate her gambling habit. Somewhat surprisingly, a majority of the Ontario Court of Appeal refused to strike the plaintiffs' claim. The majority determined that it was not plain and obvious that causes of action under each heading were doomed to fail. The decision has significant implications for the evolution of each of the main causes of action under consideration by the majority.

Knowing Receipt

With respect to knowing receipt, the majority was prepared to allow the claim to go forward based on a factual pleading that the defendant knew (i) that the gambler in question was a problem gambler, that (ii) problem gamblers sometimes steal money; and that the gambler in question gambled large sums of money over a relatively short period of time. This was held to be enough to possibly give rise to a duty to inquire as to the source of the funds. This approach may significantly expand the scope of recovery for knowing receipt since it appears to tolerate basing constructive knowledge on knowledge of a risk of impropriety and not knowledge of specific circumstances giving rise to a duty to enquire.

Negligence

With respect to negligence, the majority allowed the claim to

proceed on the basis that it was not plain and obvious that a casino did not owe a duty of care to third parties who might be defrauded by a problem gambler. This is a significant development since it is has not been definitively accepted in Ontario that a casino owes a duty of care even to the problem gambler herself. Other jurisdictions in Canada have rejected such a duty (See *Walsh v. Atlantic Lottery Corporation*, *Burrell v. Metropolitan Entertainment Group)*. The Ontario Court of Appeal itself upheld a refusal to certify a "problem gambler" class action involving self-exclusion contracts in *Dennis v. Ontario Lottery and Gaming Corporation*.

This makes the majority's decision somewhat surprising in leaving the door open to a duty to third parties. The reasoning on this issue does not devote significant analysis to the policy issues involved in leaving the door open to a duty of care in favour of third parties defrauded by problem gamblers. Rather, the majority's refusal to close the door on a duty depends upon a high-level analogy between the economic losses caused to fraud victims and the losses caused to victims of impaired drivers in commercial host cases. This high-level analogy, however, risks minimising the significant distinction between physical harm and economic loss. Moreover, the Court scarcely addresses another vital policy question in a case like this—the risk of indeterminate and uncontrollable liability flowing from the recognition of a duty like this.

Unjust Enrichment

The majority's analysis of the unjust enrichment claim may also have significant implications. The majority appears to have left the door open to the plaintiff arguing that the general alleged unconscionability of the casino's conduct could displace any juristic reason for the defendant's enrichment. This would allow the Court to notionally reverse the gambler's losses and to restore the proceeds to the third parties she defrauded.

It is difficult to assess the precise implications of the Court's decision because the majority and the dissent appear to disagree about precisely what the majority was doing. Hoy ACJO's dissent assumes that the majority viewed the possible unconscionability of the contractual relationship between the gambler and the Casino as supporting an unjust enrichment claim. The majority, however, does not appear to frame the unconscionability issue so narrowly. It held simply that "if a trier of fact were to determine that OLGC acted unconscionably with respect to Ms. Spinks, a problem gambler, it is not plain and obvious that the appellants' action in unjust enrichment would fail."

The majority appears to be suggesting that "acting

unconscionably" by itself is capable of justifying a court in notionally unwinding the consequences of a problem gambler's action and redistributing the proceeds of that exercise to third parties of whom the casino has no knowledge. The majority justified itself in taking this step by referring to the well-known dicta in *Soulos v. Korkontzilas* describing the law of constructive trusts as developing "under the broad umbrella of good conscience".

It is somewhat odd that the Court would have referred to *Soulos* in this way, since *Soulos* concerned the imposition of a constructive trust in circumstances where there was no unjust enrichment. The use of the Court's general statements about good conscience as a touchstone for recovery in unjust enrichment can have significant implications. Liability for unjust enrichment, like liability for general negligence, can become all-encompassing unless courts recognize and adhere to strict limits designed to control the extent of liability.

Implications

That the Court's recent decision simply involves a pleadings motion is not a sufficient answer to these concerns. The mischief caused by the potentially all-encompassing causes of action allowed to proceed in *Paton Estate* would not be alleviated if the defendant is successful at trial. Exposure to indeterminate liability and to the notional undoing of settled transactions causes mischief simply because claims are asserted seeking to achieve these ends. All such claims have settlement value, which immediately adjusts expectations in ways that merit principled consideration, consideration that is arguably absent from the majority's decision.

It may be that later courts will dial back the more wide-reaching aspects of this decision. For the time being, it will serve as a boon to plaintiffs. The fact that there is a strong dissent by Hoy ACJO may invite the Supreme Court of Canada to scrutinize this case if the defendant seeks leave.