



BY MICHAEL LIPTON AND CHANTAL CIPRIANO

# Liability Potentially Extended to Gamblers

*Will the result of the controversial decision in *Paton Estate v. Ontario Lottery and Gaming Corporation*<sup>1</sup> (“OLGC”) impose a duty of care on the OLGC similar to the “commercial host” duty of care that is owed by establishments serving alcohol?*

The case arises out of the actions of a solicitor’s clerk, who due to a chronic gambling problem, stole millions of dollars from the Paton Estate (the “Estate”) and other clients of the solicitor’s firm by forging documents, and selling Estate assets. Over a fourteen month period, she lost millions belonging to the Estate by playing at an OLGC casino while misrepresenting herself as a lawyer. The causes of action against the OLGC included unjust enrichment, negligence and knowing receipt of trust funds for failure to scrutinize the source of the clerk’s money and permitting a compulsive gambler to continue gambling at its casinos.

The motion court judge struck the statement of claim on the grounds that the clerk misrepresenting herself as a lawyer to the operators of the OLGC’s casinos did not lead to the conclusion that the OLGC had notice she was gambling with trust funds obtained by fraud. In addition, the judge found that the OLGC had valid reasons for retaining money that it had received, since it did not owe a duty of care to the clerk as a problem gambler, and accordingly did not act negligently. Consequently, the claim was struck on the basis that it did not allege a reasonable cause of action and that it was “plain and obvious” the lawsuit would have no chance of success.

The Ontario Court of Appeal refused to strike the statement of claim, holding that the duty of care provisions which related to commercial hosts may apply to gaming

establishments. The majority found that the Estate could be afforded protection if it could be determined that the OLGC suspected gambled money was being stolen. Additionally, the claim relating to unjust enrichment would not necessarily fail if the OLGC knew that the clerk was a problem gambler and allowed her to gamble. As outlined by the Court of Appeal, case law does not definitively establish that casinos owe no duty of care to problem gamblers. However, while casinos cannot be expected to conduct “an individualized assessment of each of their customers”, much more is expected of them when an individual is a pathological gambler.

The *Liquor License Act*<sup>2</sup> (the “Act”) imposes an explicit duty of care on commercial hosts under sections 29 and 39 of the Act. Under section 29, “No person shall sell or supply liquor or permit liquor to be sold or supplied to any person who is or appears to be intoxicated”. Under section 39, civil liability is imposed if the person to or for whom the liquor is sold commits suicide or meets death by accident; or if injury or damage is caused to another person or property.

The case puts forward the argument that the duty owed by a commercial host, such as a tavern keeper, who enjoys profits from customers consuming large quantities of alcohol, may apply with equal force to casino operators. This argument may be flawed for three reasons: firstly, civil liability under section 39 deals with physical damage, whereas in the case of casino operators, the issue would be purely related to economic

negligence. Secondly, while the Act explicitly imposes liability and a duty of care, the *Gaming Control Act*<sup>3</sup> does not. Thirdly, the duty of care two stage test outlined in *Ann v. Merton London Borough Council*<sup>4</sup> would not necessarily be satisfied. The loss incurred by the Estate was not reasonably foreseeable by the OLGC and no relationship of proximity existed as the two parties were too far removed. If this part of the test fails, there is no opportunity to put forward policy considerations to negate liability under the second part of the test.

While casinos have a “Know Your Client” (“KYC”) obligation, extending that obligation to include differentiating between addicted and problem gamblers versus wealthy customers with an expensive hobby would be too onerous for casino operators. This case leaves us wondering whether extending the duty of care to casino operators as is the case with commercial hosts will open the floodgates to litigation and whether casinos will be required to be more diligent with respect to its KYC obligations. Only time will tell. **CGL**

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1. 2016 ONCA 458.

2. R.S.O. 1990, c. L.19.

3. S.O. 1992, c. 24.

4. [1978] A.C. 728.