



I-Introduction:

Responsible Gambling in the United Kingdom - the aftermath of entry into force of Gambling Act of 2005

After the Gambling Act of 2005 came into force, the rate of problem gambling in Great Britain has remained largely unaltered (0.5% to 0.8% of the adult population) between the time of the first British Gambling Prevalence Survey in 1999 and the most contemporary consolidated Health Surveys in 2012 (see Sproston *et al*, 2000; Wardle *et al*, 2007; Wardle *et al* (2011); Wardle *et al* (2014), Gambling Commission, Public Perceptions of Gambling, 2015, Sproston *et al*, 2000; Wardle *et al*, 2007; Wardle *et al* (2011); these data are ordinarily used to advise that despite the augmentation of the gambling market (and the creation of new products), no supplementary harm has been caused. There is a wide range of reasons to exercise caution when considering this perspective.² “For one, it disregards research on adaptation- that in the absence of supply-side change, rates of problem gambling will decay over time as exposure effects wear off. Stable rates of problem gambling may not necessarily signify an absence of additional harm. The very facts of the rapid expansion of gambling’s availability, the significant growth in expenditure and the shift in consumption towards fast, repetitive forms - as well as the increasing physical dislocation between operator and customer - should prompt further enquiry.”³ In its 2010 report, the Australian Productivity Commission identified a number of limitations of prevalence survey findings, expressing concerns about representative-

ness, the likelihood that problem gamblers would answer questions honestly, the subjective nature of any scoring mechanism and the appropriateness of using diagnostic screens designed for clinical settings.⁴ Some have questioned whether asking people to assess their own behaviour - even where done honestly and accurately - is likely to be effective in identifying harm. As Shaffer (2001) wrote, “One of the primary concerns about DSM-IV centers on how it has advanced the reliability of psychiatric diagnosis at the cost of diagnostic validity.”⁵ Lastly, “problem gambling screens are designed to capture something of the individual’s relationship with gambling. They do not attempt to identify actual harm to the gambler or to others - such as family members or employers. Unfortunately, there is no agreed framework in place to understand the true extent of gambling-related harm in Britain (just as there is no yardstick for its benefits).”⁶

Do Casinos Owe a Duty of Care to Problem Gamblers in the UK?

Beware of What You Wish!

By Hugo Luz dos Santos¹

II-Background -

What is problem gambling?

First things first. How can one outline an accurate definition of problem gambling or problem gambler?⁷

Despite the existence of problem gambling, there have been continuous difficulties with establishing a broadly accepted definition. Conversely, despite being widely used, the terms “responsible gambling” and “responsible provision” are also scarcely defined. Albeit, differences in definition are paramount because they impact solutions provided to solve (directly or indirectly) the problem.⁸

For illustration, the Australian Productivity Commission (1999), inserted a wide assortment of definitions of problem gambling that variously highlighted either symptoms (e.g., loss of control, illusion of control about the outcome of the game, loss chasing behaviour) or effects (e.g., disruption, turmoil, and damage to personal, family or work life, constant work absenteeism, domestic violence, suicide, murder). One broadly accepted definition is that carved out by the Victorian Casino and Gaming Authority (VCGA) which emphasizes that problem gambling occurs “where a person’s gambling activity gives rise to harm to the individual player, and/or to his or her family, and may extend into the community.”⁹

On the other hand, “Problem Gambler” is widely characterized as any person whose ability to resist the impulse to gamble has been impaired, or whose gambling has seriously compromised, disrupted, or damaged personal family (domestic violence, suicide), or vocational pursuits.¹⁰

As outlined above, while gambling may be considered by many as a dazzling form of entertainment and an amusing leisure pursuit, its core nature encompasses a wide range of social risks. Problem gambling (PG) behaviours take place when individuals gamble in a manner that exceeds their means, for more money than they can afford and spending excessive time gambling, all which can cause detrimental effects on the lives of the gambler and of his family (if any). Such effects may encompass overlooking family, job concerns and duties, health, hygiene, and even employment, as well as financial obligations, which vigorously portray the deleterious phenomenon of Problem Gambling or excessive gambling as not only an issue at the individual level, but also for wider society.¹¹

III-Discussion –

Do casinos owe a duty of care to problem gamblers in the UK: paradigmatic case *Calvert v. William Hill* (UK High Court, 2008)

A rather alluring test case concerning the (putative) duty of care owed to problem gamblers and the public was heard in the United Kingdom High Court in 2008. It related to Graham Calvert, a compulsive and excessive gambler who eventually reached debts totaling over £2 million. The case orbited around Mr. Calvert’s early request to William Hill, with whom he placed the bulk of his bets, to carry out casino “self-exclusion.” This means that, at the gambler’s request, the bookmaker shuts down the excessive gamblers’ account, ordinarily for a period of six months, and bans or restricts them from placing any bets for the same period. The main aim of this facility is to give problem or excessive gamblers a feasible way to curb their excessive gambling problem once they have acknowledge that their gambling activity is spiraling out of control and becoming a problem. “Mr. Calvert sued William Hill because, two months after he excluded himself, he was able to open a new account in his own name, and continue gambling. He claimed that the bookmaker had breached the duty of care owed to him when they allowed him to return to gambling. The judge eventually dismissed Mr. Calvert’s claim.”¹² There is a wide range of reasons for this which provide an insightful explanation of the very concept of the duty of care. In the first instance, the case portrayed the gradations (or shall we say layers?) of this duty. The judge stated that there was a double-layer duty in the case of bookmakers or even casinos; he subsequently ruled that there was a lesser duty owed to cash gamblers (customers) than there was to credit customers.¹³

This case depicts the intricacy of the legal arguments concerning duty of care and its close relation to negligence and compensation (redress) claims in the United Kingdom. Albeit Calvert’s case was unsuccessful, it is fully expected to spark an overhaul (or more modestly, a rethink) of both gambling legislation and the bookmakers’ internal and commercial policy. More broadly, it is likely to become a touchstone case for other breach of duty claims.¹⁴

Our question remains fully unanswered: do casinos of the United Kingdom owe a duty of care to problem gamblers? One ought to emphasize this is a murky question. One cannot pro-

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vide a straightforward and plain answer to this intricate and complex issue. Moreover, the pointed out difficulty has been felt elsewhere¹⁵.

Generally, as to the claim in negligence, while casinos cannot investigate every problem gambler, there might exist an obligation to do so where a gambler is unmistakably addicted to (excessive) gambling. Moreover, the factual finding that casinos would go out of business requires an evidentiary record as does the conclusion that indeterminate liability¹⁶ would be the outcome of acknowledging a duty of care limited to players or gamblers who are conspicuous problem gamblers. Noticeably, Courts of Common Law use the analogy of commercial alcohol providers who owe a duty to blameless third parties to demonstrate that it is not transparent and evident that the claim will fail.¹⁷

“On the other hand, in the duty of care analysis, there is a possibility that foreseeability may be established. However, there is no reasonable prospect that sufficient proximity could be found and, even if it were found, there would be residual policy concerns of indeterminate liability which would negate a duty of care.”¹⁸

Finally, one should not forsake or disregard the self-responsibility of problem gamblers. Although their mental health disease (problem gambling) should be taken into account, that does not override the axiom that problem gamblers should spare no efforts to refrain themselves from resuming gambling in the casinos of United Kingdom or elsewhere. When it comes to resuming gambling, self-restraint is a word that problem gamblers should put in practice rather than just vaguely pronouncing it.

It is conceivable that casinos should employ a considerable amount of effort in order to proactively identify the prob-



lem gamblers and prevent them from resuming gambling in their facilities, especially whenever problem gambling foreseeability has been thoroughly established. However, in light of the United Kingdom legal framework, one can scarcely assert that casinos do owe a boundless duty of care to problem gamblers. Stating otherwise might just exonerate problem gamblers from their own unwitting decisions. Placing a limitless duty of care onto casinos will shift the burden from the self-responsibility of problem gamblers altogether and that is not acceptable.

As a result, before one can foresee it, a Pandora's box will open of unlimited liability of casinos of United Kingdom regarding problem gamblers: do we really want that to happen? Beware of what you wish!

IV- Conclusion

The gaming industry has been good for the United Kingdom, as the thriving of that leisure industry has brought along fun for all, the ultimate purpose of casinos worldwide.

Nonetheless, the gaming leisure industry has also brought along some social costs to United Kingdom, such as problem gaming or excessive gaming.

Although there can be room for an exquisite temptation to place the burden onto casinos regarding preventing problem gamblers from resuming their noxious and harmful gambling activity, the preferable approach should be the one that squares the self-responsibility of problem gamblers to seriously exercise their self-restraint, with the obligation of the casinos to proactively identify and track down the problem gamblers and, when feasible, to prevent them from returning to the casinos and placing their bets.

Other exotic (shall we say hazardous?) approaches would be prone to open the deleterious Pandora's Box of boundless (and unacceptable) liability of casinos of United Kingdom. ♣

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² DAN WAUGH, "Budd Revisited - Gambling in Great Britain 15 years on", in: *UNIV Gaming Research & Review Journal*, Volume 20 Issue 2, pp. 141-161, (2016), whose research we have been following very closely in this point.

³ DAN WAUGH, "Budd Revisited - Gambling in Great Britain 15 years on", *cit.*, pp. 141-161.

⁴ DAN WAUGH, "Budd Revisited - Gambling in Great Britain 15 years on", *cit.*, pp. 141-161.

⁵ DAN WAUGH, "Budd Revisited - Gambling in Great Britain 15 years on", *cit.*, pp. 141-161.

⁶ DAN WAUGH, "Budd Revisited - Gambling in Great Britain 15 years on", *cit.*, pp. 141-161.

⁷ For further developments, HUGO LUZ DOS SANTOS, "Responsible Gambling: subsidies for the implementation of a functional interdisciplinary model", in: *Gaming Law Review and Economics*, New York, (2018), pp. 1-30, being published.

⁸ In this sense, in the Australian doctrine, HELEN BREEN/JEREMY BUULTJENS/NERILEE HING, "The Responsible Gaming Code in Queensland, Australia: Implementation and Venue Assessment", in: *UNIV Gaming Research & Review Journal*, Volume 9, Issue 1, (2005), p. 44.

⁹ See BREEN/BUULTJENS/HING, *id.*, p. 44.

¹⁰ See WILLIAM V. SASSO/JASMINKA KALAJDZIC, "Do Ontario and Its Gaming Venues Owe a Duty of Care to Problem Gamblers?" in: *Gaming Law Review and Economics (GLR&E)*, Volume 10, Number 6, (2006), p. 552.

¹¹ See, ANDREW HARRIS/ADRIAN PARKE, "Empirical evidence for the differential impact of gambling outcome on behavior in electronic gambling: Implications for harm-minimization strategies", in: *Responsible Gaming Review*, April 2015, Vol. 1, No 2, (2015), p. 10.

¹² J.A. ARANSON, *Duty of Care*, (2014), p. 1, we have been following closely on this matter.

¹³ J.A. ARANSON, *Duty of Care*, (2014), p. 1.

¹⁴ J.A. ARANSON, *Duty of Care*, (2014), p. 1.

¹⁵ For instance in June, 2016, the Court of Appeal of Canada released its decision in the *Paton Estate v. OLG*, 2016 ONCA 458 regarding the candent issue of duty of care of casinos towards problem gamblers.

¹⁶ Although this decision (*Paton Estate v. OLG*, 2016 ONCA 458) may be regarded as an jurisprudential development of the "concepts of foreseeability and proximity in negligence", the vast majority of the Court of Appeal did not go so far as to conclude that casinos owe a duty of care to third party victims of problem gamblers but, rather, only determined that the question should be answered with the benefit of a full factual record. Moreover, the vast majority's decision on the verisimilitude of the claim in negligence appears to have been based fundamentally on its newness as opposed to a full application of the established *Anns/Cooper* analysis (that we have mentioned earlier in this article) used to ascertaining the existence of a duty of care. An unrestricted application of the *Anns/Cooper* analysis has been undertaken by Associate Chief Justice Hoy, who, in discord, concluded that there was scarce proximity between the plaintiffs (problem gamblers) and defendant (casino) and that the proclaimed duty of care would uncliothe the defendant to "liability in an indeterminate amount for an indeterminate time to an indeterminate class"; see DAVID ELMAN/LAURA DAY, *Duty of Care to Victims of Problem Gamblers not "Hopeless"*, (2016), p. 1.