COURT OF APPEAL FOR ONTARIO

CITATION: Dennis v. Ontario Lottery and Gaming Corporation, 2013 ONCA 501
DATE: 20130731
DOCKET: C55923

Weiler, Sharpe and Rouleau JJ.A.

BETWEEN

Peter Aubrey Dennis and Zubin Phiroze Noble

Plaintiffs (Appellants)

and

Ontario Lottery and Gaming Corporation

Defendant (Respondent)

Jerome R. Morse and Hassan Fancy, for the appellants

James Doris and Matthew Milne-Smith, for the respondent

Heard: April 15, 2013

On appeal from the order of the Divisional Court (Justices Wailan Low and Katherine E. Swinton, Justice Janet Wilson (dissenting)), dated December 2, 2011, with reasons reported at 2011 ONSC 7024, 344 D.L.R. (4th) 65, dismissing an appeal from the order of Justice Maurice C. Cullity of the Superior Court of Justice, dated March 15, 2010, with reasons reported at 2010 ONSC 1332, 318 D.L.R. (4th) 110.

Sharpe J.A:

[1] Peter Aubrey Dennis was a problem gambler. He signed a self-exclusion form provided by the Ontario Lottery and Gaming Corporation ("OLG"). In the self-exclusion form, OLG undertook to use its "best efforts" to deny signatories entry to its facilities, but excluded liability if it failed to do so. Despite signing the form,

Dennis returned to OLG facilities on a regular basis for over three years to gamble and lost significant sums of money. His claim against OLG is based on the allegation that OLG failed to exercise its best efforts to exclude him from its facilities. The action is framed in breach of contract, negligence, occupiers' liability and, on behalf of Dennis's spouse, Zubin Phiroze Noble, for damages under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*").

[2] Dennis and Noble seek certification of their claims under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"). Dennis wishes to represent a primary class of approximately 10,428 individuals (Class A Members), who are defined in the Amended Amended Statement of Claim as all residents of Ontario and the Unites States, or their estates, who signed a self-exclusion form between December 1, 1999 and February 10, 2005. Noble seeks to represent family members who suffered *FLA* damages (Class B Members).

[3] The motion judge refused certification essentially on the ground that all significant issues of liability turned on proof that individual class members were vulnerable, pathological problem gamblers who returned to OLG facilities despite signing the self-exclusion form. On appeal to the Divisional Court, the majority agreed with the motion judge and dismissed the appeal. The dissenting judge was of the view that signing the self-exclusion form was sufficient proof of vulnerability and that the issues of OLG's alleged fault in relation to problem gamblers who signed self-exclusion forms were common and certifiable.

[4] For the following reasons, I would dismiss the appeal. In my view, the motio judge and the majority of the Divisional Court correctly concluded that this was not a proper case for certification as a class action.

FACTS

[5] This proposed class action is brought to recover damages flowing from gambling losses incurred as a result of OLG's alleged failure to exercise its best efforts, and to take adequate care, to exclude individuals who signed self-exclusion forms from its gambling venues.

[6] The appellants plead that Dennis and each of the Class A Members were "problem gamblers" who suffer from a progressive behavioural disorder that causes them to become preoccupied with gambling and to engage in excessive gambling. The behaviour, known as "problem gambling", is alleged to cause a range of harm to them and their family members, including emotional, social, financial, legal, employment, education and health-related harms. The pleadings allege that OLG had special knowledge of the risks and harms of its gambling venues, including the nature of problem gambling. The pleadings further assert that Dennis and the Class A Members gave notice to OLG of their vulnerability as problem gamblers when they signed the self-exclusion forms.

[7] The pleadings assert that Dennis signed a self-exclusion form on May 23, 2004, after gambling well over $350,000 at OLG slot machines. It is alleged that after Dennis signed the form, OLG repeatedly failed to deny him entry to OLG

venues and to detect and remove him once he gained entry. As a result of OLG's failure, he claims to have suffered financial losses of approximately $200,000, and various other specified losses.

(1) OLG's Self-Exclusion Program

[8] OLG's gambling facilities have offered a self-exclusion program since their inception. Paul Pellizzari, the Director of Policy of OLG, described the program as follows:

> Self-exclusion is a self-help tool to enable patrons to take positive action to address problems they may be experiencing with gambling. The objective of the self-exclusion program is to help patrons acknowledge their responsibilities over their gambling behaviour, and the potential implications of excessive gambling. Self-exclusion is a form of positive action patrons can take to address problems they may be experiencing with gambling.
>
> The patron initiates the self-exclusion process. To date, over 17,000 patrons have chosen to do so, and currently, approximately 12,500 remain self-excluded. In most cases a patron will identify himself or herself on the gaming floor to casino staff or security indicating that he/she wants to self-exclude. In administering its program, and when handling requests for self-exclusion enrolment, OLG makes no determination of an individual's state or possible condition. The self-exclusion process does not require judgment, assumption or assessment that a self-excluded patron is in fact a problem gambler or a pathological gambler.

[9] Under OLG's practices at the relevant time, patrons who wished to self-exclude were interviewed by casino staff and required to provide photo identification

and to sign a self-exclusion form. The self-excluder's photograph was taken and circulated to security officers at gaming facilities around the province. OLG's practice was to use memory-based enforcement. Members of the security staff were responsible for recognizing self-excluded persons from their photographs and refusing them entry or removing them from gambling venues.

(2) OLG's Self-Exclusion Form

[10] OLG has used a number of different self-exclusion forms from 1994 to the present. The forms signed by Dennis and approximately 10,000 other Class A Members between December 1, 1999 and February 10, 2005 were identical in all material respects. OLG's commitment is described in the following manner:

> We offer you the opportunity to self-exclude yourself from Ontario Lottery Corporation ("OLC") and Ontario Casino Corporation ("OCC") gaming venues. Self-exclusion will direct the OLC and commercial casino operators acting for OCC to use their best efforts to deny you entry, as a service, to all OLC and OCC gaming venues in the province of Ontario.

[11] The forms also state that if self-excluders are detected, they can be ejected from the gaming facility.

[12] The forms specifically state that OLG "accept[s] no responsibility, in the event that you fail to comply with the ban, which you voluntarily requested" and contains the following release on the part of the signatory:

> I release and forever discharge the OLC, OCC, and the commercial operators and any of the operators' parent

> companies, shareholders, subsidiaries or affiliates, or successors, as well as any and all of their Directors, Officers and employees, from any and all liability, causes of action, claims and demands whatsoever in the event that I fail to comply with this voluntary ban.

(3) The Statement of Claim

[13] The Amended Amended Statement of Claim asserts that Dennis and each Class A Member were problem gamblers who signed the self-exclusion form, thereby giving notice to OLG of their vulnerability as problem gamblers, but were nonetheless permitted entry to a gambling venue after signing the form where they engaged in gambling and suffered injuries and losses as a result.

[14] The pleadings allege that OLG "knew or ought to have known that the measures it had implemented to deny Self-Excluded Customers entry to its Gambling Venues were ineffective or likely to prove ineffective" for various specified reasons, including the "obvious" limitations of using memory-based enforcement when millions of customers enter OLG facilities annually. The appellants allege that OLG failed to implement other reasonable measures, such as requiring gamblers to present photo identification to enter.

(i) Negligence

[15] The claim alleges that it was reasonably foreseeable that Dennis and the Class A Members would suffer harm, that they were in a relationship of proximity with the OLG, and that OLG owed them a duty of care as a commercial host or otherwise to take reasonable steps to exclude them from its gambling venues. It is

alleged that OLG's breach of its duty of care to Dennis and each of the Class A Members caused serious injuries and losses to the appellants and the other class members, which are wholly due to OLG's negligence.

(ii) Occupiers' Liability

[16] In the alternative, the appellants plead that the injuries and losses of class members were caused by OLG's failure as an occupier of premises to take such due care as was reasonable to ensure that the appellant Dennis and Class A Members were reasonably safe while on the gambling premises, in breach of the relevant provisions of the *Occupiers' Liability Act*, R.S.O 1990, c. O.2 ("*OLA*").

(iii) Breach of Contract

[17] In the alternative, the appellants plead that OLG breached both its contractual obligations to Dennis and the Class A Members under the self-exclusion forms and its duty to exercise good faith in discharging those obligations, amounting to fundamental breaches which caused serious and permanent injuries and losses to the class members.

(iv) Relief Requested

[18] The pleadings seek various forms of relief including, in respect of Class A and B Members, general and special damages of $2.5 billion and punitive damages of $1 billion. There is also a claim that Dennis and Class A Members are entitled to

"waive the tort" claim and elect to claim payment of OLG's revenues or net income or profits from problem gamblers engaging in gambling activities.

(4) Proposed Common Issues

[19] The appellants' proposed 15 common issues were aptly summarized by the Divisional Court, at para. 22:

1. Whether the self-exclusion forms are binding contracts;
2. Whether OLG owes a tort duty to Class A Members to take reasonable care to deny them entry;
3. Whether OLG owes a duty as an occupier of premises to detect and remove Class A Members;
4. Measures taken by OLG to deny entry in the period from December 1, 1999 to date and the duration of such measures;
5. Whether OLG breached its contractual obligations and the particulars of the breaches;
6. Whether OLG delegated the conduct/management of its gaming facilities in breach of ss. 206 and 207 of the *Criminal Code*;
7. Whether OLG breached its tort duty;
8. Whether OLG breached its statutory duty as an occupier;
9. Whether OLG may avoid liability by reason of the expiration of the applicable limitation periods;

10. Whether the damages sustained by Class A Members owing to any breaches of duty by OLG can be determined on an aggregate basis, and if so, how they should be distributed;
11. Whether Class A Members may elect to "waive the tort" and require OLG to account for its gross revenues or net profits, and if so, the quantum and how they should be distributed;
12. Whether Class B Members sustained damages pursuant to s. 61 of the *FLA*, and if so, the quantum and how they should be distributed;
13. Whether the class members are entitled to punitive damages and how they should be distributed;
14. Whether OLG should pay pre and post-judgment interest, and if so, how it should be distributed; and
15. Whether OLG should pay the costs of administering and distributing any judgment.

STATUTORY PROVISIONS

[20] The *CPA* governs class proceedings in Ontario. The provisions relevant to this appeal are:

> 5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant who,

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

...

23. (1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

...

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

JUDGMENTS

(1) Superior Court of Justice

[21] The motion judge concluded that the proposed class action did disclose a cause of action but failed to satisfy all other criteria required for certification. The central and fatal problem identified by the motion judge was that, at their core, all the claims rested on the proposition that each Class A Member is a vulnerable, pathological problem gambler. That is something that can only be determined on an individual, case-by-case basis and it follows that the claim was not one that could be certified.

(i) Cause of Action – s. 5(1)(a)

[22] Applying the "plain and obvious" test, and reading the claim generously, the motion judge found that pleadings disclose a cause of action and that s. 5(1)(a) was satisfied.

Contract

[23] The motion judge found that it is not plain and obvious that the self-exclusion form was not a contract, or that the claim for breach of contract could not succeed as framed. The key issue is the exclusion of liability clause. OLG offered a service to assist problem gamblers while excluding any of its legal responsibility if it failed to

do so. It is arguable that if OLG knew its program was ineffective and offered it only for public relations purposes, the exclusion of liability clause may be ineffective as unconscionable and contrary to public policy.

Negligence

[24] The appellants allege that OLG could reasonably foresee that problem gamblers would suffer harm if not excluded from gambling premises and that it breached its duty of care by persisting in using an ineffective system. The motion judge found that it is arguable that OLG was in a relationship of proximity with Dennis because OLG established the self-exclusion program and held the program out as assisting problem gamblers. He further found that, on the basis of the pleadings, it is not plain and obvious that policy considerations ought to negative the resulting duty of care.

Occupiers' Liability

[25] The appellants argue that OLG breached s. 3(1) of the *OLA* which imposes a duty on an occupier to take such care as is reasonable in the circumstances to ensure the safety of those entering the occupier's premises. The motion judge found that it is not plain and obvious that gambling cannot be a dangerous activity for a problem gambler or that such a gambler would "willingly" assume the risks of gambling. While economic loss is not compensable under the *OLA*, Dennis pleaded that he suffered psychological harm, and it is not plain and obvious that this type of injury is not compensable under the *OLA*.

Waiver of Tort

[26] The appellants request the restitutionary accounting of profits obtained by OLG from problem gamblers within the class. The motion judge noted that this area of law is uncertain. He found that it is not plain and obvious that Dennis has not made out the requirements for such a cause of action.

(ii) Class Definition – s. 5(1)(b)

[27] The motion judge found that, in respect of the Class A Members, the proposed class definition employs objective criteria but fails to meet the requirements of s. 5(1)(b) because it is over-inclusive as it cannot be assumed that everyone who signed the form is a vulnerable pathological gambler.

[28] The motion judge also found that there is an absence of a rational connection between the class definition and the proposed common issues. The motion judge concluded, at para. 189, that:

> 1. the claims advanced on behalf of the class members are predicated, and dependent, on their vulnerability;
>
> 2. vulnerability is not a condition of class membership. As defined, and, in consequence, causes of action that are addressed by the proposed common issues are not confined to compulsive gamblers;
>
> 3. the problem of over-inclusiveness of the class definition, and the consequential individualistic nature of the proposed common issues, cannot be resolved by the use of statistical evidence to characterize a percentage of the class members as pathological problem gamblers; and

> 4. in consequence, the requirement of a class in section 5(1)(b) and of common issues in section 5(1)(c) of the *CPA* are not satisfied and certification must be denied.

(iii) Common Issues – s. 5(1)(c)

[29] The vulnerability of each individual Class A Member is essential to the validity of their claims. While it can be presumed that most self-excluded patrons were at least apprehensive about their vulnerability, the degree of their addiction, if any, and the significance to be attributed to the concept of personal autonomy could only be determined on an individual basis.

[30] The motion judge rejected the contention that the problem of the heterogeneity of the proposed class could be overcome by statistical evidence indicating that approximately 87 per cent of self-excluded individuals would likely be pathological gamblers. The motion judge explained, at paras. 211-12, that OLG's liability could not "be determined on the basis of statistical probability" as the *CPA* is a procedural statute that "does not abrogate the requirement that a defendant can be found liable only to those persons who can prove their claims."

[31] In the motion judge's view, liability could only be established by an inquiry into the personal circumstances of each class member at particular times, their gambling history, the extent of their addiction or compulsion to gamble, and their likely behaviour if OLG had exercised its best efforts or reasonable care.

[32] For example, determining whether OLG breached its duty to employ its best efforts to exclude self-excluded individuals would depend on whether the individuals

attempted to gain entry. That is an individual inquiry. Experts agreed that a significant number of class members would not have attempted re-entry and, in the view of the motion judge, the issue of breach of duty could not be decided on the basis of expert evidence of the statistical probability that class members would attempt re-entry. The issue of causation would also require an individual inquiry into whether there was a causal link between losses incurred by class members and the alleged breaches by OLG. Further, the other proposed common issues would depend on the issues identified by the motion judge as lacking commonality. As a result, the motion judge found that these issues would have to be so truncated that their resolution would not significantly advance the proceeding.

[33] Given the questions of law and fact that would remain to be determined after the trial of the common issues, there would be no possibility of an aggregate assessment of damages pursuant to s. 24 of the *CPA*.

[34] The motion judge summarized his discussion of the common issues requirement, at paras. 192 and 231:

> If Mr Dennis, or any of the other class members, had advanced the same claims in individual actions, [OLG] would have been entitled to raise issues relating to personal autonomy and degrees of vulnerability in connection with elements of liability such as reasonable foresight of harm; proximity; unconscionability; a willing assumption of risk for the purposes of section 4(1) of the OLA; causation of proven losses; contributory negligence; and punitive damages. The right of [OLG] to pursue such issues on an individual basis is not, in my opinion, excluded by pursuing the claims under the procedure of

> the CPA and defining the class, and the common issues, without reference to the vulnerability of the class members. Nor, for the reasons I will give, can the issues be resolved by reference to statistical probabilities.
>
> ...
>
> For the reasons given, I am of the opinion that the attempt to define the common issues in a manner that would avoid an inquiry into the status of each class member as a "problem gambler" has not been successful. I am satisfied that a proceeding that requires a consideration of the nature, degree and consequences of each class member's gambling propensities is individualistic to an extent that it is not amenable to resolution under the procedure of the CPA. The common issues would have to be so truncated that their resolution would not sufficiently advance the claims of the class members. They would, for the most part, be limited to the interpretation of the forms and the adequacy of [OLG]'s efforts to enforce self-exclusion.

(iv) Preferable Procedure – s. 5(1)(d)

[35] Finally, the motion judge found that the preferable procedure requirement was not met. None of the three goals of class proceedings – judicial economy, access to justice and behaviour modification – would be served. Given the preponderance of individual issues relating to the degree of vulnerability of each of the class members for the purpose of determining whether actionable breaches of duty occurred, a class proceeding would offer no gain in judicial economy. The amounts at stake are large enough that individual actions could be viable and therefore access to justice is not an issue. OLG is already subject to persistent scrutiny and has taken significant steps to improve its self-exclusion and

responsible gaming programs, rendering behaviour modification relatively unnecessary.

(v) Litigation Plan – s. 5(1)(e)

[36] Given his conclusions on the foregoing issues, it was apparent that the litigation plan was not satisfactory and that the requirements of **s.** 5(1)(e) were not met.

(2) Divisional Court

(i) Majority

[37] The majority agreed with the motion judge that the test for certification was not met. Even if the interpretation of the self-exclusion form is a common issue, entry without ejection by each class member is a necessary element of the alleged breach of contract. There was evidence that some class members did not try to re-enter and some who did so were stopped by security. This issue must be proved on an individual basis. Further, the issue of unconscionability relating to OLG's attempt to exclude liability is an individual issue dependent on the vulnerability of each class member and the degree to which they may have been victims of unequal bargaining power. Nor can damages for breach of contract be assessed in the aggregate.

[38] The execution of the self-exclusion form is not proof of existence of the illness of problem gambling in each person who signed. The presence of illness and

the consequent vulnerability in each class member is a factual issue that can only be decided on an individual basis. The duty of care is alleged as being rooted in OLG's knowledge of the vulnerability of individual class members, which also goes to foreseeability of loss or harm to each individual class member.

[39] The issue of liability for breach of duty of care is also individual. Answering whether OLG owes a tort duty to take reasonable care to deny entry to class members depends on the individual circumstances of class members and the knowledge of OLG of those circumstances. Even if executing the self-exclusion form raises a tort duty, determining that issue does not really advance the action because of the individuality of the issue of breach. Moreover, there will be significant individual issues involving contributory negligence and causation.

[40] Similar problems arise with respect to the occupiers' liability claim which rests on the proposition that gambling is a dangerous activity for problem gamblers.

[41] Quite apart from the frailty of the studies underlying the appellants' statistical evidence that 87 per cent of those who signed self-exclusion forms would be pathological gamblers, the *CPA* does not permit the requirement of commonality to be avoided by statistical estimates of probability.

[42] Finally, the motion judge's conclusion that a class action is not the preferable procedure reveals no error and is reasonable on the facts of this case. Regarding access to justice, it is common ground that there have been a number of individual lawsuits launched against OLG by persons similarly situated to the appellants in

this action. None have been tried. The settlements have been significant, with payments of $167,000 on average. This suggests that claimants are not averse to litigating with OLG when significant amounts are in issue.

(ii) Dissent

[43] The dissenting judge rejected the proposition that vulnerability as a problem gambler had to be proved on an individual basis. OLG was well aware of the issue of problem gambling and the self-exclusion program was designed to address that issue. By signing the self-exclusion form, Dennis and class members provided "some basis in fact" to meet the test of commonality. The statistical evidence was admissible and simply bolstered the other available evidence establishing some basis in fact for the common issues.

[44] The dissenting judge stated that the focus should be on OLG's conduct when considering the common issues and preferable procedure criteria. In her view, the common issues include whether OLG committed systemic breaches of duty in tort or contract by using the memory-based enforcement system despite its ineffectiveness. She concluded that the appellants had shown that there is some basis in fact to support the argument that everyone who signed a self-exclusion form shares a common interest in ascertaining whether OLG breached its obligations under the self-exclusion form.

[45] She found, however, that damages cannot be assessed in the aggregate under s. 24 of the *CPA*, using statistical evidence pursuant to s. 23 of the *CPA*, and would therefore have refused to certify damages as a common issue.

[46] In her view, a class proceeding is the preferable procedure. The costs of individual actions would be crushing and make it impossible for plaintiffs to litigate these issues individually. Certifying the class action would promote access to justice and the public would benefit from the lawsuit's generation of reliable information on the consequences of the legalization of gambling. Certification would also serve the goal of behaviour modification.

ISSUES

[47] The issues raised by the appellants are as follows:

1. Did the motion judge and the Divisional Court err in finding that the class definition was objectively over-inclusive to satisfy s. 5(1)(b)?
2. Did the motion judge and the Divisional Court err in finding that the common issues requirement of s. 5(1)(c) was not met?
3. Did the motion judge and the Divisional Court err in finding that the preferred procedure and litigation plan requirements of s. 5(1)(d) and (e) were not met?

[48] By way of cross-appeal, the respondent raises the following issue:

4. Did the motion judge and the Divisional Court err in finding that the claim discloses a cause of action as required by s. 5(1)(a)?

ANALYSIS

(1) Individualized Inquiry or Systemic Wrong?

[49] Before turning to an item-by-item consideration of the specific requirements for certification under s. 5 of the *CPA*, I will set out what I consider to be the central issue that arises on this appeal: is this a case in which the need for individualized inquiry is so pervasive that it overwhelms the appellants' attempt to treat it as a case of systemic wrong?

[50] The motion judge's central finding, upheld by the Divisional Court, is that the claims advanced inevitably require an individualistic inquiry into the nature, degree and consequences of each class member's gambling propensity.

[51] The appellants submit that the issue of certification should focus not on the individual circumstances of the class members but rather on the allegations of wrongdoing by OLG. The claim is described as one of systemic wrong. It is submitted that certification should be granted in order to permit the proposed class to litigate the issue of the alleged systemic wrong and that individual issues of vulnerability, causation and damages can then be determined on a case-by-case basis in subsequent proceedings. The appellants focus on several issues they argue are suitable for resolution on a class-wide basis including the interpretation of

the self-exclusion form, whether the exclusion of liability clause is enforceable, whether OLG breached its contractual best efforts obligation, and whether OLG owed and breached a duty of care in tort.

[52] The motion judge and the majority of the Divisional Court gave detailed reasons for rejecting the appellants' argument. I essentially agree with those reasons.

[53] There are certainly cases in which a class action will be an appropriate procedure to deal with a "systemic wrong", a wrong that is said to have caused widespread harm to a large number of individuals. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula.

[54] The case law offers many examples in which a class action has provided an appropriate procedural tool to resolve claims when all class members are exposed to the same risk on account of the defendant's conduct. These include claims arising from:

- overtime policies that impose more restrictive conditions for overtime compensation than permitted by statute (*Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, 111 O.R. (3d) 346; *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501);
- defective products (*Lambert v. Guidant Group* (2009), 72 C.P.C. (6th) 120 (Ont. S.C.));
- illegal or unauthorized charges to credit card customers (*Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321; *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401); or
- the operation of a school designed to create an atmosphere of fear, intimidation and brutality (*Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.)).

In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring individualized determination are whether and to what degree that conduct harmed the class members.

[55] The claim at issue here does not fit that category. The central problem is that the alleged fault of OLG does not turn solely on the execution of the contract. It is inextricably bound up with the vulnerability of the individual class members. The complaint against OLG is that it failed to prevent them from harming themselves.

The harm suffered by Dennis and other Class A Members resulted from their own actions. They were the ones who returned to OLG premises to gamble and to lose money. In that regard, they were like the thousands upon thousands of individuals who frequent OLG premises to gamble and, more often than not, lose money. Unsuccessful OLG gamblers have no recourse against OLG for their losses.

[56] The entire premise of the statement of claim and the causes of action pleaded is that because they signed the self-exclusion form Dennis and the other Class A Members are different from other OLG gamblers: they are vulnerable and OLG was obliged to protect them because of their vulnerability. In my view, it is inescapable that to assess whether OLG was at fault and liable to them for the self-inflicted harm they suffered, the court could not decide the case simply on the basis that they had signed the form. Rather, the court would have to engage in a detailed inquiry into the particular circumstances of individual gamblers including: their gambling history; the nature and severity of their addiction and vulnerability to gambling; whether and to what extent they experienced moments of clarity; whether they returned to OLG facilities to gamble despite signing the self-exclusion form; if they did return, the nature and extent of their gambling and whether they returned because of their addiction; whether they could have been prevented from gambling or suffering losses; whether and to what extent their failure to self-exclude contributed to the loss; and whether the exclusion of liability clause is enforceable against the particular individual.

[57] The issue of OLG's alleged fault cannot usefully or fairly be considered in the abstract and without reference to the circumstances of each individual class member. As the motion judge observed, assessment of each Class A Member's claim will necessarily involve careful, individualized consideration of legal and factual issues relating to his or her personal autonomy and responsibility. Without answers to those specific and individualized questions, it would be impossible to assess whether OLG was at fault or whether OLG bears any legal responsibility to protect them from their own actions. Similarly, whether a Class B Member sustained damages and the quantum thereof involves an individual inquiry and depends on a finding that OLG is liable to the Class A Member from whom the claim derives.

[58] I recognize that certification may be appropriate in cases in which individualized inquiries will be required after re olution of the common issues, so long as resolution of the common issues would "significantly advance the action": *Cloud*, at para. 76. I am persuaded, however, that the claims advanced in this case and the allegations of fault against OLG are so heavily infused with the issues of individual vulnerability that resolution of those allegations in terms of a generalized systemic wrong would not significantly advance the claims of the individual class members.

[59] Rather than providing an effective procedural tool to advance the resolution of the claims of the proposed class members, a class proceeding would amount to

little more than a general commission of inquiry into the prevention of problem gambling. It may well be the case that OLG could and should have done more to protect problem gamblers from the disastrous consequences of their affliction. But even if that is the case, a general determination of shortcomings in OLG policies would not address in a meaningful way the narrower specific legal issue of OLG's liability to individual problem gamblers for the losses they have suffered. The claims advanced inevitably require an individualistic inquiry into the nature, degree and consequences of each class member's gambling propensity.

[60] Before considering OLG's cross-appeal as to the cause of action requirement of s. 5(1)(a), I will consider the appellants' attack on the findings relating to the other four criteria for certification.

(2) Class Definition – s. 5(1)(b)

[61] I agree with the motion judge that the proposed class definition of Class A Members is fatally over-inclusive. It includes all individuals who signed self-exclusion forms over a period exceeding five years. That class will include many individuals who have no claim, even if a potentially actionable failure on the part of OLG to enforce the self-exclusion form is made out. It is apparent that the problem of the class definition raises very similar issues to the question of common issues.

[62] It is conceded that some individuals who signed the form did not return to gamble. Plainly, they have no claim. Nor do those who attempted re-entry but were excluded. Further, it cannot be the case that an individual who signed the form but

returned to lose money is thereby automatically entitled to claim those losses from OLG. An OLG patron cannot immunize himself or herself from gambling losses by singing a self-exclusion form. It follows that to make out a claim, a class member would have to establish, on an individual basis, that he or she returned to an OLG facility, lost money and suffers from vulnerability produced by the affliction of pathological gambling, and that OLG could and should have prevented the particular harm from having occurred.

[63] I cannot agree with the appellants' contention that, assuming it can be established that OLG committed an actionable failure to use its "best efforts" to exclude those who signed the self-exclusion form, everyone who signed the form has a "tenable" claim for breach of contract, negligence, occupiers' liability and waiver of tort. The gap between a finding that OLG failed to use best efforts to exclude and an actionable claim in law is unacceptably wide. That gap could only be filled with detailed inquiries into the individual circumstances of each and every class member, revealing the fatally over-inclusive nature of the proposed class definition.

[64] This case is distinguishable from *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.) in which the court certified a claim by college students for breach of contract based on the college's failure to provide an option it had promised. In *Hickey-Button*, the college had promised every student a program option and allegedly failed to provide that option.

The class definition was not over-inclusive as the contract of every student was breached by the defendant's unilateral failure to provide the option it had promised. Liability did not hinge upon the individual circumstances or conduct of the students. Damages might vary depending upon the likelihood that the individual student would have taken the option, but all students had a claim for failure to provide the option.

[65] I do not agree that all signatories of the self-exclusion form are in the same position as the students in *Hickey-Button.* The failure of the college to provide the option in *Hickey-Button* deprived all students of a promised benefit. The students had paid their fees for a program that included that option and, in and of itself, the failure to provide that promised option constituted a breach. In the case of OLG and self-excluders, once again, we encounter the problem that any claim is dependent upon the actions of the members of the proposed class. The promised benefit of the promise to use "best efforts" to exclude is, by its very terms, directly tied to the actions of the self-excluder. Taking the claim at its highest, OLG promised self-excluders that if they attempted re-entry, best efforts would be made to exclude them. Any value attached to the promise to use best efforts could only come into play if and when the obligation to use best efforts was triggered by the self-excluder's attempt and success in gaining re-entry. If the self-excluder did not attempt entry or attempted and was excluded, it is difficult to see how there could be an actionable breach. Nor could failure to use best efforts, without more, ground

a claim in negligence or occupiers' liability as damages are an essential element of a claim in tort.

(3) Common Issues – s. 5(1)(c)

[66] Several recent decisions of this court identify a list of the key factors used to assess whether a proposed common issue is capable for certification. In *Fulawka,* Winkler C.J.O., writing for the court, stated, at paras. 80-81:

> What then is an appropriate common issue for certification purposes? As noted above, s. 1 of the *CPA* defines common issues as issues that are: (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts. Section 5(1)(c) includes as a condition for certification that the claims or defences of the class members raise common issues.
>
> There are a number of legal principles concerning the common issues requirement in s. 5(1)(c) that can be discerned from the case law. Strathy J. provided a helpful summary of these principles in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 87 C.P.C. (6th) 276. Aside from the requirement just described that there must be a basis in the evidence to establish the existence of the common issues, the legal principles concerning the common issues requirement as described by Strathy J. in *Singer*, at para. 140, are as follows:
>
> > The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis[.]
> >
> > An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution[.]

There must be a rational relationship between the class identified by the plaintiff and the proposed common issues[.]

The proposed common issue must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of that claim[.]

A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class[.]

With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class[.]

A common issue cannot be dependent upon individual findings of fact that have to be made with respect to each individual claimant[.]

Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis[.]

Common issues should not be framed in overly broad terms: "It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the

> proceeding less fair and less efficient"[.]
> [Citations omitted.]

[67] While this list is "by no means exhaustive", it provides a useful summary of the legal principles used to decide whether there are suitable common issues: at para. 82.

[68] In my view, resolution of the issue of OLG's alleged systemic wrong fails on all of the listed factors. There is no "rational relationship between the class identified by the plaintiff and the proposed common issues" and the class definition is overly inclusive. Resolving the issue of whether OLG should have done more by way of enforcement of the self-exclusion forms does not make up even "a very limited aspect of the liability question" given the inherently and inescapably individual nature of the claims at their core. The significance of any determination as to OLG's allegedly wrongful conduct is dwarfed by the need to focus on the individual issues of vulnerability and would not amount to "a substantial ingredient of each class member's claim" nor would its resolution sufficiently "advance the litigation for (or against) the class". The answer to the proposed common issue would not "be capable of extrapolation, in the same manner, to each member of the class" as the issues of duty, breach and causation are inextricably bound up with the individual circumstances of the class members. OLG's alleged wrongdoing is entirely "dependent upon individual findings of fact that have to be made with respect to each individual claimant". There is no "workable methodology" to determine issues of causation or damage on a class-wide basis. Finally, as I have already explained,

OLG's alleged misconduct is framed in "overly broad terms" and it is inevitable that the action will "ultimately break down into individual proceedings".

[69] As in *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.), the "vanishing premium" case involving insurance sold in the expectation that high interest rates would cover the cost of premiums, establishing that the defendant was systemically negligent "would not represent a substantial ingredient in each of the class members' claims" and would not "move the litigation forward": at para. 47 (citation omitted). This court held that each class member would still have to show that misrepresentations had been made to him or her, that those representations "constituted negligent misrepresentations about the premium offset feature, and that the prospective policyholder reasonably relied upon the representation": at para. 47. The court concluded that "[i]nevitably such an action would ultimately break down into individual proceedings": at para. 47 (citation omitted). I reach the same conclusion here.

[70] The majority judgment of the Divisional Court, at paras. 51-65, conducted a detailed, item-by-item assessment of each of the 15 proposed common issues and concluded that none would significantly advance the litigation to warrant certification. The majority found that all proposed common issues either required individual inquiry or involved issues such as damages that are dependent upon a finding of liability. For the reasons given above, I agree with that analysis.

(4) Preferable Procedure – s. 5(1)(d)

[71] Even if the class definition and common issue requirements were satisfied, it is my view that a class action is not the preferable procedure. A general finding of "systemic wrong" would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member. A more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions as it is inevitable that a class proceeding will break down into individual proceedings in any event.

(5) Litigation Plan – s. 5(1)(e)

[72] Little more need be said regarding this criterion as it is follows from what I have already written the given the nature of the claims advanced, the appellants' litigation plan is inadequate.

(6) OLG's Cross-Appeal – s. 5(1)(a)

[73] As the motion judge made clear, there are many significant legal hurdles for the appellants to overcome in making out a claim, in particular, the exclusion of liability clause and the release in the self-exclusion form as well as the difficult issue of proximity and duty of care in negligence. However, as the motion judge also pointed out, the pleading is to be read generously and a claim will fail at this stage only when it is plain and obvious that it cannot succeed. The legal issues were fully addressed by the motion judge. I have summarized his reasons above and I am

not persuaded that he erred in concluding that the claim survived the minimal scrutiny for substantive adequacy mandated by s. 5(1)(a).

[74] Accordingly, I would dismiss the cross-appeal.

DISPOSITION

[75] For these reasons, I would dismiss both the appeal and the cross-appeal. Counsel for OLG indicated at the conclusion of oral argument that OLG was not seeking costs if successful. In these circumstances, the appropriate order is to dismiss both the appeal and the cross-appeal without costs.

Released: JUL 3 1 2013

KMW

[illegible] J.A.

I agree K.M. Weiler J.A.

I agree [illegible] J.A.