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### **Are problem gamblers owed a duty of care under Australian law?**

#### **Introduction**

Although it is generally understood that no duty of care is owed to problem gamblers to prevent them from suffering gambling loss, recent Australian case law suggests that there may be instances where a successful claim in negligence can be brought.

#### **Negligence**

##### When can a claim be made?

Two recent cases have considered this issue in detail and, whilst in both instances the plaintiff gamblers have lost their cases, the courts have left the door open for a claim to be made successfully in negligence for economic loss incurred through gambling in an 'extraordinary' case. However, two cases currently progressing through Australian Courts may meet the criteria required of being sufficiently out of the ordinary – *Preston* and *Kakavas*. In each of these cases, the plaintiff alleges active encouragement and exploitation to gamble by the relevant gaming operator.

##### Reynolds

*Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 (*Reynolds*) recognised the principle that problem gamblers cannot recover economic losses suffered from gambling. In that case, the plaintiff gambler brought a claim against the Katoomba RSL Club to recover substantial losses incurred while gambling on poker machines on the Club's premises. Even though the Club was advised that the plaintiff was a problem gambler and was requested not to cash his cheques or extend credit, no steps were taken to prevent him gambling, and the plaintiff's cheques continued to be cashed by the Club.

The New South Wales Court of Appeal held that no duty of care was owed by the Club to Mr Reynolds. This applied the principles established in the leading Australian case on pure economic loss, *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (*Perre*).

Spigelman CJ found that "[s]ave in an extraordinary case, economic loss occasioned by gambling should not be accepted to be a form of loss for which the law permits recovery."<sup>1</sup> Even though reference was made to extraordinary cases, no examples were given of circumstances when such a case may arise.

Spigelman CJ considered that *Reynolds* was an ordinary case where a duty of care should not be recognised as the loss occurred following a "deliberate and voluntary act on the part of the

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person to be protected."<sup>2</sup> As a result, an extraordinary case may occur when action by the venue operator reduces the ability of a gambler to exercise control over their own actions.

Indeed, Spigelman CJ stated that a duty of care to a gambler should only be held to exist after careful consideration, as "loss of money by way of gambling is an inherent risk in the activity and cannot be avoided."<sup>3</sup> Despite this, it was held that "whether a duty arises in a particular case must depend on the whole of the circumstances, even in the case of an inherent risk", leaving open the possibility that a claim of negligence in an extraordinary case may be successful.

One area where a duty of care may arise to enable a plaintiff to recover economic loss occurs where a plaintiff is sufficiently vulnerable to harm resulting from a defendant's conduct. In *Perre*, the High Court stated that a plaintiff will be more vulnerable if they are induced to act in a way that prevents them taking steps to protect themselves from the risk of pure economic loss.<sup>4</sup>

## Preston

This principle is illustrated in *Preston v Star City* (1999) NSWSC 1273 (*'Preston'*). This case is a clear indication that the Australian law relating to claims in negligence for pure economic loss is still developing.

*Preston* involves proceedings alleging negligence and breach of statutory duty relating to losses of approximately \$3 million suffered by the plaintiff in gambling at the Sydney Star City Casino.<sup>5</sup> Among the allegations made are that the defendant casino offered the plaintiff inducements to gamble. These included the provision of a cheque cashing facility, the supply of complimentary products, services and privileges, such as liquor, free of charge and the defendant informing the plaintiff "that if he remained a 'high roller' patron it would make available various business contracts related to its procurement needs or promotions."<sup>6</sup>

The Court came to the view that the statement of claim should not be struck out for disclosing no reasonable cause of action. Star City argued that no duty of care could exist as the offering of inducements is an ordinary part of commercial activity. Master Harrison held that this argument did not "take into account the duty of care a casino operator may owe to a person who is intoxicated and induced to gamble."<sup>7</sup> A defendant "may owe a greater duty of care where the patron is heavily intoxicated, his reasoning is impaired and he does not appreciate the consequences of offering inducements."<sup>8</sup>

On appeal, Wood CJ held that the plaintiff may be owed a duty of care in these circumstances. Wood CJ acknowledged that a duty of care in this context might not "go so far as preventing the offer of a limited or reasonable range of inducements and complimentary services"<sup>9</sup>; however, he stated that a duty of care may exist to prevent "the provision of significant credit facilities or excessive encouragement through incentives, of a person who has specifically asked to be barred or to go beyond a limit that he has asked the casino to set."<sup>10</sup>

In agreeing with Master Harrison's conclusion that the plaintiff's claims in negligence could not be said to be hopeless or untenable, Wood CJ acknowledged that the Court should be astute not to risk stifling the development of the law.<sup>11</sup>

In refusing to strike out the claim for negligence, Wood CJ stated "The evolving nature of the tort of negligence, and the incremental approach that appears to be favoured [in *Perre v*

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*Apand]* make it inappropriate to take this step merely because no category of case of this kind has been recognized in this country."<sup>12</sup>

Wood CJ distinguished *Reynolds* on the basis that it did not involve any allegation that the defendant had engaged in active inducement or deliberate conduct designed to take advantage of the plaintiff's personal failings.<sup>13</sup> In *Reynolds*, it was held to have been the plaintiff's own "choice" whether to use the gambling facilities or not.<sup>14</sup> *Reynolds* was also distinguished on the ground that the regulatory framework for a registered club is not the same as that for a casino.<sup>15</sup>

Wood CJ stated that the existence of a duty of care to problem gamblers in respect of gambling losses would not necessarily create a danger of indeterminate liability so long as the duty is confined to known problem gamblers<sup>16</sup>. In other words, the imposition of a duty of care to problem gamblers does not place an unreasonable burden upon the autonomy or commercial enterprise of the casino, and there is good reason to give effect to the concerns as to the 'deleterious' social impact of gambling in permitting a right of recovery at general law where the controls laid down in the casino legislation or regulations are contravened to the detriment of the gambler. Any damages that might be awarded if a duty of care was imposed would not necessarily be 'unfair, or unreasonable or disproportionate' in all of the circumstances<sup>17</sup> considering the capacity of common law to 'place brakes on unlimited recovery' through principles such as the defence of contributory negligence or a cross-claim that the plaintiff's conduct was foolhardy or reckless.<sup>18</sup>

## Foroughi

The recent case of *Foroughi v Star City Pty Limited*<sup>19</sup> ('*Foroughi*') followed *Reynolds*. In that case, the Court held that Star City did not owe Mr Foroughi a duty of care to prevent self-inflicted economic loss from gambling when he breached his voluntary exclusion order. Jacobson J found that the alleged duty of care in *Foroughi* was weaker than that argued in *Reynolds*, as Mr Foroughi "expressly and voluntarily undertook responsibility for his own conduct in agreeing not to enter the gaming areas of Star City and to seek assistance and guidance of a qualified and recognized counselor."<sup>20</sup>

However *Foroughi* also recognised that claims may be made successfully by gamblers in extraordinary cases. This can be implied from Jacobson J's statement that, in an ordinary case such as *Foroughi*, "a gambler who enters a casino in breach of a voluntary exclusion order and suffers losses will have no redress in the form of a damages claim against the casino."<sup>21</sup> By inference this would mean that, in a different factual scenario, where the circumstances are 'out of the ordinary', an outcome different to that reached in *Foroughi* may be achieved.

## Preston No. 3

This inference is supported by the reference made in *Foroughi* to the decision in *Preston v Star City Limited (No 3)* [2005] NSWSC 1223 ('*Preston No. 3*'), where Hoeben J permitted a claim in negligence to proceed to trial because the allegations went beyond those made in *Reynolds v Katoomba RSL*. In *Preston No 3*, the plaintiff claimed Star City knew of the plaintiff's problem and actively encouraged and exploited it.<sup>22</sup> In *Foroughi*, no such claim was made.

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## Kakavas

In another case before the courts, a gambler has sued Crown Casino to recover approximately \$30 million in gambling losses. In *Kakavas v Crown Ltd and John Williams* VSC No. 4964 of 2007, Mr Kakavas alleges that, despite his access to the casino being restricted by voluntary and compulsory exclusion orders, the CEO of Crown Casino "devised a scheme to the Plaintiff to recommence gambling at the Casino" and instructed Crown Casino employees "to contact the Plaintiff and to do what was necessary to induce the Plaintiff to recommence gambling at the Casino."<sup>23</sup>

Kakavas alleges that he was induced to gamble at Crown Casino. Among other inducements alleged to have been made by Crown Casino was the use of a jet on about 30 occasions to fly him to Melbourne, gifts of thousands of dollars on many occasions including when he boarded the plane or arrived at the casino hotel, and, on several occasions, being extended lines of credit by the casino of up to \$1.5 million.<sup>24</sup>

If it is proved that Crown Casino encouraged Mr Kakavas to gamble despite the exclusion orders, the actions of the casino may fall within the category of extraordinary circumstances referred to by Spigelman CJ in *Reynolds* and a duty of care may well be found to have been owed to Mr Kakavas.

A point of difference between *Preston* and *Kakavas* is that Mr Kakavas was under both voluntary and involuntary exclusion orders and was therefore legally barred from entering casinos. However, *Foroughi* indicates that the Courts will not automatically conclude that a duty of care exists where a gambler is excluded.

## **Breach of statutory duty**

A cause of action for breach of statutory duty will arise where a statute "which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection."<sup>25</sup>

However, Courts appear unwilling to recognise breaches of statutory duties of care in claims brought by problem gamblers, never gambling losses, as evidenced by the outcome of the claims in *Reynolds* and *Preston*.

In addition to a claim in negligence, the plaintiff in *Preston* claimed for breach of statutory duty by the defendant casino in allowing him to gamble whilst intoxicated, which was alleged to constitute a breach of section 163 of the *Casino Control Act 1992* (NSW) which prohibits intoxicated persons from gambling at the casino.

On application by the defendant casino to strike out the plaintiff's claim for breach of statutory duty, Master Harrison held that a private right of action will arise if policy considerations and parliamentary intent shows that such an action was intended.<sup>26</sup> After finding evidence of such intention, it was held that it was not untenable that such a private right of action may have arisen from a breach of section 163.<sup>27</sup>

On appeal, Wood CJ came to a contrary conclusion, holding that it is necessary to have regard to the statute as a whole and that, in consideration of the comprehensive regulatory scheme set up under the *Casino Control Act 1992* (NSW), which already provides for

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measures such as disciplinary action in the event of a contravention of the regulations, the legislative intention required to confer a private right of action for damages was lacking.<sup>28</sup>

The claim for breach of statutory duty was struck out as being incapable of being supported in law.

The plaintiff in *Reynolds* also alleged breach of statutory duty arising from the *Registered Clubs Act 1976*, however this claim was dismissed at first instance on the basis that the *Registered Clubs Act 1976* did not expressly confer a private right of action, nor was there a legislative intention to confer such a private right.<sup>29</sup>

## **Conclusion**

What is an "extraordinary" case remains to be seen; however it appears that excessive inducements with the knowledge of the gambler's problems, especially if evidenced by an exclusion order, may suffice to enable a gambler to claim successfully under Australian law recovery of gambling losses, on the basis of a breach of duty of care.

## **For more information please contact:**

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- <sup>1</sup> *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234 at [9] per Spigelman CJ
- <sup>2</sup> *Ibid* at [17] per Spigelman J.
- <sup>3</sup> *Ibid* at [27].
- <sup>4</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at [35].
- <sup>5</sup> *Preston v Star City Pty Limited* [1999] NSWSC 459 at [3] per Harrison M.
- <sup>6</sup> *Preston v Star City Pty Limited* [1999] NSWSC 1273 at [5] per Wood CJ.
- <sup>7</sup> *Ibid* at [38].
- <sup>8</sup> *Preston v Star City Pty Limited* [1999] NSWSC 1273 at [38].
- <sup>9</sup> *Ibid* at [190].
- <sup>10</sup> *Ibid* at [133].
- <sup>11</sup> *Ibid* at [110].
- <sup>12</sup> *Ibid* at [118].
- <sup>13</sup> *Ibid* at [156].
- <sup>14</sup> *Ibid* at [128].
- <sup>15</sup> *Ibid*.
- <sup>16</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180 per McHugh and Hayne JJ.
- <sup>17</sup> *Ibid* at [427] per Callinan J.
- <sup>18</sup> *Preston v Star City Pty Limited* [1999] NSWSC 1273 at [143] per Wood CJ.
- <sup>19</sup> *Foroughi v Star City Pty Limited* [2007] FCA 1503.
- <sup>20</sup> *Ibid* at [127].
- <sup>21</sup> *Ibid* at [150].
- <sup>22</sup> *Ibid* at [129].
- <sup>23</sup> *Kakavas v Crown ltd and John Williams* VSC No. 4964 of 2007 Statement of Claim at [14].
- <sup>24</sup> ABC Radio National Transcript, *Background Briefing: The law and gambling* (29 April 2007).
- <sup>25</sup> *Byrne & Frew v Australian Airlines Ltd* (1995) 185 CLR 410 at 424 per Brennan CJ and Dawson and Toohey JJ.
- <sup>26</sup> *Ibid*.
- <sup>27</sup> *Preston v Star City Pty Limited* [1999] NSWSC 459 at [28] per Harrison M.
- <sup>28</sup> *Preston v Star City Pty Limited* [1999] NSWSC 1273 at [87] per Wood CJ.
- <sup>29</sup> *Reynolds v Katoomba RSL All Services Club* (2000) Aust Torts Reports 81-545.