NOVA SCOTIA COURT OF APPEAL
Citation: *Walsh v. Atlantic Lottery Corporation*, 2015 NSCA 16

Date: 20150213
Docket: CA 423106
Registry: Halifax

Between:

Bernard Patrick Joseph Walsh

Appellant

v.

The Atlantic Lottery Corporation Inc., The Nova Scotia Gaming Corporation, The Nova Scotia Alcohol and Gaming Authority and the Attorney General of Nova Scotia

Respondents

Judges: MacDonald, C.J.N.S.; Oland and Farrar, JJ.A.

Appeal Heard: November 18, 2014, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Oland and Farrar, JJ.A. concurring.

Counsel: Appellant in person
Selina Bath and James Boudreau, for the respondent The Atlantic Lottery Corporation Inc.
Duane Eddy, for the respondent The Attorney General of Nova Scotia

Reasons for judgment:

[1] The appellant's attempt to hold the Provincial Government responsible for his gambling addiction was dismissed summarily by the Supreme Court of Nova Scotia, 2013 NSSC 409. He now appeals to this Court. For the following reasons, I would dismiss the appeal.

Background

[2] In the early 1990's the Government of the day introduced and regulated the use of coin operated Video Lottery Terminals (VLTs). They ended up in many public establishments including bars and corner stores. To certain users, these machines were tragically addictive. Mr. Walsh was an early victim. He alleges great suffering including bankruptcy, divorce, and health problems.

[3] Mr. Walsh insists that the Government should bear at least some of the responsibility for his losses because it knew (or ought to have known) that these machines were inherently dangerous and that they would produce victims like him. He filed a three-prong claim alleging: (a) negligence in that the Government owed and breached a duty to protect him from the scourge of these machines; (b) that the Government owed and breached its fiduciary duty to him, and (c) that the Government was strictly liable because it created an inherently dangerous product.

[4] To support these assertions, Mr. Walsh highlights the following in his statement of claim:

> 8. The Plaintiff states that the Defendants knew or ought to have known of the inherent dangers and deceptive nature of Video Lottery Terminals (VLT's) prior to May, 1991, the particulars of which are as follows:
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> (a) VLT's electronically programmed to create cognitive distortions yielding a fake perception of winning;
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> (b) VLT's have hidden odds of the chance of winning;
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> (c) VLT's have asymmetric wheels that give a false impression of the odds of winning;
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> (d) VLT's have non-linear pay tables, which encourage players to bet higher amounts and incur higher losses;

> (e) VLT's mimic on screen the mechanical reel slot machine, and have asymmetric virtual reels that are programmed to give a near miss effect by which the consumer is manipulated into believing that he almost won;
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> (f) VLT's combine randomness with concealed asymmetry to cheat the player;
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> (g) VLT's have video displays that utilize subliminal priming to deceive consumers and manipulate them into hyper-focusing and to create a dangerous dissociative mental state, wherein players cannot make rational decisions to continue to play or not;

[5] The Government, as represented by the various respondents, insisted that this claim was a non-starter because its impugned actions represented legitimate government policy. It, therefore, asked the Supreme Court to dismiss the matter summarily.

[6] Justice Arthur J. LeBlanc heard the motion and agreed with the Government. He dismissed the claim accordingly. Mr. Walsh has now asked us to overturn this ruling and reinstate his claim.

The Motion Judge's Decision

[7] Justice LeBlanc was well aware of the heavy burden faced by the Government. It would have to establish that, assuming every alleged fact to be correct, the claim still would have no chance of success. He observed:

> [16] Summary judgment on the pleadings should not be granted lightly. A party whose action is summarily dismissed under Rule 13.03 will be denied his or her day in court. The harsh nature of the remedy demands that the applicant meet a heavy burden. I must be satisfied, even after assuming that all allegations contained in the pleadings are true without the need to call evidence, that the claim "is certain to fail", or is "absolutely unsustainable" or "discloses no reasonable cause of action": *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)*, 2009 NSCA 44 at para. 17, *Eisener v. Cragg*, 2012 NSCA 101 at para. 9.

[8] In his decision, the judge addressed all three prongs of Mr. Walsh's claim. First, he carefully reviewed the law of negligence as it applied to state actors. This led him to consider whether the applicable legislation, namely the *Gaming Control*

Act, SNS 1994-1995, c. 4, created a potential duty of care to Mr. Walsh. He concluded that it did not:

> [71] The authority of the Province to decide which gambling activities present an acceptable level of risk is limited only by its duty to exercise its statutory functions in a manner consistent with the public good. Nothing in the *Act* or the Regulations discloses a legislative intent to create private law tort duties to individuals or distinct segments of the population who may be adversely affected by a decision of the Province to introduce a particular form of gambling to the public.
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> [72] It follows from this conclusion that the legislation, without more, also fails to establish the special link or proximity necessary to give rise to a positive duty to protect Mr. Walsh from any increased risk associated with a particular form of gambling, whether by issuing a warning or ensuring the availability of adequate gambling addiction treatment facilities.
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> [73] In this case, the relationship between the Province and Mr. Walsh is indistinguishable from the Province's relationship with the public at large. Mr. Walsh does not belong to a discrete and identifiable segment of the community that the Defendants knew or ought to have known was at an increased risk of suffering significant harm due to the introduction of VLT gambling.
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> [74] I also find that the decision to introduce video lottery gambling and collect revenue therefrom is insufficient on its own to bring the Province or its agents within the categories of defendants identified in *Childs* who owe a positive duty to a plaintiff by virtue of their material implication in the creation of risk to which others have been invited.
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> [75] Finally, Mr. Walsh's responsibility for his autonomous choice is a further factor weighing against a finding of proximity: *Burrell* at para. 41. Mr. Walsh made the autonomous choice to participate in VLT gambling. After becoming addicted, he chose not to seek help until 1997. Mr. Walsh cannot expect this Court to absolve him of all responsibility for the effects of these autonomous choices.
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> [76] Even if I am wrong that the relationship between Mr. Walsh and the Defendants lacks the necessary proximity to give rise to a *prima facie* duty of care, any such duty would be negatived at the second stage of the *Anns* test for overriding policy reasons.

[9] Furthermore, the judge was, in any event, satisfied that the Government's actions reflected legitimate government policy which the courts would respect:

[80] I am satisfied that the decision to introduce and regulate VLT gambling in Nova Scotia, like the decision considered in *Burrell* to allow gambling in casinos, is a policy decision based on economic, social and political factors. In deciding whether the introduction of a particular form of gambling is in the best interests of the public, the Province must balance a myriad of competing objectives and interests. It is not for the court to second guess the Province's conclusion that the benefits of VLT gambling to the public outweigh the risks.

[81] The Plaintiff contends that even if the decision to introduce VLT gambling is a policy decision, it is a policy decision so irrational and unreasonable that it cannot be said to constitute a proper exercise of discretion. I disagree. There is nothing in the pleadings to support an allegation that the decision to introduce and regulate VLT gambling in Nova Scotia was made in bad faith.

[82] It is an unfortunate reality that not all members of the public will benefit from every policy decision made by government. In fact, some individuals will be harmed by government decisions. That being said, evidence of harm, without more, will not be sufficient to establish that a policy decision was made in bad faith. As the Ontario Court of Appeal noted in *Attis v. Canada (Minister of Health)*, 2008 ONCA 660, leave to appeal denied, [2008] SCCA No 491:

> 65 … The job of the government is to govern and, in the course of doing so, to make broad-based policy decisions for the benefit of the public collectively, even if those decisions may not have positive implications for all individuals. It would severely curtail the government's ability to govern if it were found to have the necessary direct and close relationship to an individual member of the public to support a claim in tort for bad government policy decisions. It is accepted that, if the government fails to make good decisions in these areas, the public will demonstrate its displeasure at election time.

[83] The Plaintiff further contends that even if I conclude that the decision to introduce VLT gambling is a policy decision made in good faith, the decision to allow VLTs to be installed in so many different locations, and the decisions not to affix warning labels to the machines or to provide adequate addiction treatment facilities, are operational decisions that expose the Defendants to liability. I cannot agree. In my view, each of these is a policy decision.

[84] An evaluation of the level of risk associated with VLT gambling is inherent to the policy decision to introduce this form of gambling to the public. The Province clearly concluded that the risks of VLT gambling, when weighed against the political, social and economic benefit, did not rise to a level requiring the

Province to warn the public of the risks or to refuse to introduce this form of gambling altogether.

[85] The Province's awareness that VLTs, like all forms of gambling, present a risk of addiction is borne out by the measures adopted in the legislation to reduce the risk to what the Province considered an acceptable level. These steps include limiting the amount of money a player can lose on any one play, permitting players to withdraw for payment or reimbursement at any time, programming the machines to pay out not less than 80% of the money deposited, restricting advertisement of VLTs to the interior of an approved premises, prohibiting advertisement that compares VLTs to other forms of gambling, and imposing a duty on licensees to take all necessary steps to prevent persons under 19 years of age from playing VLTs.

[86] The decision as to the locations at which VLT machines would be installed also involves the consideration and weighing of political, social and economic factors. The *Video Lottery Regulations* offer some insight into the variety of factors that may be relevant to the decision whether to grant or deny an application for a registration certificate:

> 3(2) In considering an application for a registration certificate, the Commission may require information and evidence from the applicant concerning, but not limited to,
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> (a) the nature of the business carried on or to be carried on at the premises seeking approval;
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> (b) the hours of operation of the business carried on at the premises seeking approval;
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> (c) in the case of premises licensed by the Alcohol and Gaming Authority under the Liquor Control Act, evidence that such premises have been approved and a valid licence issued by the Authority;
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> (d) the public, storage and other facilities at the premises;
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> (e) the security of the premises;
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> (f) the estimated net revenues from video lottery operations as a percentage of general business revenues generated at the premises;
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> (g) the geographic location of the premises; and
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> (h) the names and addresses of all owners of the business, their respective interests and a statement of all financial encumbrances against the business including amounts and the name of the holder of the encumbrances.

> [87] As this section demonstrates, a decision as to the appropriateness of a particular location for the installation of VLT machines is based on a number of public policy factors. The degree of policy involved in the decision is sufficient to justify protection from tort liability.
>
> [88] Finally, the decision whether to provide gambling addiction treatment facilities or programs is plainly one of policy dictated by budgetary, social and political constraints.

[10] Finally, the judge feared the consequences of finding a specific duty owed to Mr. Walsh. It would open the door to limitless liability:

> [89] The other overriding policy consideration that would negative any *prima facie* duty of care in this case is the potential for indeterminate liability. Justice Cromwell in *Fullowka* explained the nature of this concern as follows:
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> > 70 … At the root of the concern is that the duty, and therefore the right to sue for its breach, is so broad that it extends indeterminately. In this sense, the policy concern about indeterminate liability is closely related to proximity; the question is whether there are sufficient special factors arising out of the relationship between the plaintiff and the defendant so that indeterminate liability is not the result of imposing the proposed duty of care. … <u>What is required is a principled basis upon which to draw the line between those to whom the duty is owed and those to whom it is not</u>… [*Emphasis added*]
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> [90] A common thread running through the cases where a duty of care has been rejected on the basis of indeterminate liability is the inability on the part of the defendant to control the extent of its potential liability: see for example: *Cooper* at para.15, *Imperial Tobacco* at para. 99.
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> [91] In the case at bar, there is nothing about the relationship between the Defendants and Mr. Walsh that distinguishes it from the Defendants' relationship with the general public. Nor was there any means by which the Defendants could control the number of persons who chose to play VLTs in Nova Scotia since 1991, or the amount of money they won or lost as a result. If this Court were to recognize the duties posited by Mr. Walsh, the liability of the Defendants would be indeterminate.
>
> [92] For the foregoing reasons, the Plaintiff's claims in negligence have no chance of success.

[11] The judge then addressed and dismissed the fiduciary duty aspect of the claim:

> [93] Recent jurisprudence establishes that claims of a fiduciary duty on the part of government will rarely be successful.
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> [94] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574, the Court adopted and applied the three-step analysis proposed by Justice Wilson in *Frame v. Smith*, [1987] 2 SCR 99, to guide the courts in identifying new fiduciary relationships:
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> > 32 Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
> >
> > (1) The fiduciary has scope for the exercise of some discretion or power.
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> > (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> >
> > (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.
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> …
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> [99] In cases such as this where there are no direct interactions or agreements between the parties, any undertaking by the government to act in the best interests of a plaintiff must be found in an imposition of responsibility by statute: *Elder Advocates* at para. 32. The undertaking must be "clearly supported" by the language of the legislation, and a grant to a public authority of discretionary power to affect a person's interest, without more, will not suffice: *Elder Advocates* at para. 45.
>
> [100] The *Gaming Control Act* imposes a duty on the Province and its agents to act in the best interests of the *public*. There is nothing in the statute which could be construed as imposing any degree of responsibility on the Province to protect Mr. Walsh's interests. Such a burden would be inherently at odds with the Province's duty to act in the best interests of the public at large. The Plaintiff's claim for breach of fiduciary duty therefore fails at the first requirement, and I need not consider the remaining two requirements.
>
> …

[12] Lastly, the judge addressed and dismissed the allegation of strict liability:

> [101] The Plaintiff alleges in his pleadings that VLTs are an inherently dangerous product and, as such, fall within the rubric of strict liability. This allegation

> deserves only brief comment. The application of the doctrine of strict liability is extremely limited in Canada. For example, unlike our neighbours to the South, we have chosen not to extend its application to manufacturers of defective products: *Andersen v. St. Judge Medical Inc.*, [2002] OJ No 260 (SCJ), *Goodridge et al. v. Pfizer Canada Inc. et al.*, 2010 ONSC 1095.
>
> [102] The suggestion by the Plaintiff that any basis exists in law for this Court to extend the doctrine of strict liability to a statutory regulator is entirely without merit. The Plaintiff's claim on this ground has no chance of success.

[13] Having found all three aspects of the claim doomed for failure, the judge dismissed the claim in its entirety.

Grounds of Appeal

[14] Mr. Walsh was represented by counsel at the motion below but is now self-represented on appeal. He lists the following grounds of appeal:

> 1. Decision was based on wrong machines vlts vs. slot machines also based on Casino decision not Government owned and operated machines
> 2. Judge had incorrect dates of timeframe in his decision.

[15] In his first ground of appeal, the "casino" case Mr. Walsh refers to is *Burrell v. Metropolitan Entertainment Group*, 2010 NSSC 476, aff'd 2011 NSCA 108. There, the plaintiff unsuccessfully sued a casino operator and the Provincial Government, after becoming addicted to casino gambling. Mr. Walsh's point is that Justice LeBlanc erred by treating his case like Mr. Burrrell's when, in his view, VLTs are much more toxic. He explains in his factum:

> 5. Mr. Burrell according to his lawsuit did not start to gamble until 1995, because as mentioned by his lawyer he played the casino. Subsequently my case can't be based on Mr. Burrell's case because Mr. Burrell didn't start gambling for 4½ years after I did and on a different type of machine and in a different type of environment. The government has no connection to the machines that are in the casinos, but do own the machines I played between 1991-1997.
>
> …

PART IV: STANDARD OF REVIEW

1. Firstly, I cannot accept the fact that I was being judged on casino gambling machines –it undermines completely the reason I launched my lawsuit.
2. Secondly, if the presiding judge did not understand the VLTs and casino slot machines were two entirely different types of gambling for the player, this case being myself, it does not dismiss the fact that the Defendants, (ALC and the NS Government) did know the different and are well aware of the damages the VLTs caused between 1991-1997. The difference between the two types of gambling machines has been well documented in studies done by the NS Government themselves. Once again I reiterate that if my addiction had been caused by the same course of action in Mr. Burrell's case I would not have launched a lawsuit myself. 96% of all gambling addicts in Nova Scotia were from NS Government owned and Atlantic Lottery run VLTs, and the other 4% are addicted to casinos, lottery tickets, scratch tickets and bingo.
3. Not being judged on the Swinging Bells machine was unfair to me, not only because the two Defendants neither owned the Casino machines, but because the ALC was not included in the lawsuit, my decision was based on having my summary judgment be decided in favor of the two Defendants. I agree gambling machines can be similar, but I deserve to be judged on the one called Swinging Bells, which, after all, they were launched 23 years ago in 1991. 96%, if not 100% of the population of Nova Scotia knows the dangers of the Swinging Bells machines and the hard it caused to myself because of the large amount of media coverage I have done since 1998 in Nova Scotia and worldwide to explain how quickly this machine can turn someone's life upside down and inside out and I still have not fully achieved a full return to life before VLTs. For this section of the factum I have to say personally I cannot believe why anyone would defend the Swinging Bells machines and what it has done.

[16] Respectfully, this argument has no merit. The judge was fully aware that this claim was only about VLTs and did not confuse them with casino slot machines which were featured in *Burrell*. The pleadings made that abundantly clear. The judge made this very clear:

> [6] Mr. Walsh says that his claims relate to the introduction to the public of a "very specific machine" which the Defendants knew or ought to have known was "inherently deceptive and dangerous". The particulars of the alleged inherent dangers and deceptive nature of VLTs are set out in the pleadings as follows: …

[17] The judge made it equally clear that Mr. Walsh's claim was not "foreclosed by the Court of Appeal's decision in *Burrell*":

> [23] Mr. Walsh has sought to distinguish his negligence claim from that advanced in *Burrell* on the basis that his claim is not about the risks of gambling generally; it relates instead to the introduction by the Defendants of an inherently dangerous and deceptive *machine* to the public. However, on close examination of the pleadings, I am not convinced that this accurately captures the distinction between the two claims.
>
> [24] Mr. Walsh does not allege that a particular VLT machine is defective and thereby rendered exceptionally dangerous or deceptive. Nor does he allege that the dangerous and deceptive properties described in the pleadings are unique to one kind or brand of VLT machine, perhaps chosen by the Defendants over other less deceptive alternatives. The allegedly dangerous and deceptive features are common to all VLT gambling machines in Nova Scotia. Accordingly, Mr. Walsh's real complaint is that the Province introduced a *form of gambling* that it knew presented a higher risk of addiction, and it elected not to warn the public of this increased risk or to implement other safeguards.
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> [25] In my view, Mr. Walsh is alleging that the decision by the Defendants to introduce VLT gambling and the *manner* in which they introduced, managed and regulated VLT gambling breached a duty to protect him from harm caused by exposure to highly addictive gambling activities. I am not satisfied that this claim is foreclosed by the Court of Appeal's decision in *Burrell*. [Emphasis in original]

[18] Regarding the second ground of appeal, Mr. Walsh alleges these factual errors:

> 6. Justice Arthur LeBlanc stated in his ruling that I admitted I had a gambling addiction in 1994, which is incorrect.
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> 7. Justice Arthur LeBlanc said I didn't seek help until 1997, which is incorrect as I sought help at Gamblers Anonymous in 1994, however the gambling helpline did not come into existence until 1995. There was no offering of help for myself of any kind from 1991-1995 at all.
>
> 8. Justice Arthur LeBlanc erred when he stated Mr. Burrell started playing the machines in 1991, as stated above Mr. Burrell admitted he started playing in 1995, therefore that also separates our two cases.

[19] Again, for the following reasons, I see no merit to this ground of appeal.

[20] First of all, should anything turn on this, the judge was not wrong about the onset of Mr. Walsh's problems. Here is what the judge said:

> [4] The Plaintiff, Bernard Walsh, began using VLTs in 1991. He went on to develop a gambling addiction. Mr. Walsh says that he first admitted to himself that he had a problem with VLT gambling in April of 1994, when his marital relationship began to deteriorate. He ceased using VLTs in 1997. Mr. Walsh claims to have suffered significant harm as a result of his gambling addiction and sues the Defendants in negligence and the Province on the additional grounds of breach of fiduciary duty and strict liability.

[21] This is an accurate accounting based on Mr. Walsh's own pleadings. Specifically, in his February 14, 2005 Reply to Demand for Particulars, Mr. Walsh states:

> 1. As to paragraph 4(a) of the Demand for Particulars, the Plaintiff states that the Plaintiff first became aware of the "serious harm and damage to his life" in approximately April of 1994 when his matrimonial relationship began to significantly deteriorate.

[22] As to Mr. Walsh's other alleged factual errors, to the extent there are inaccuracies, they would have no bearing on the judge's analysis and overall result.

Disposition

[23] The judge in this case offered a sound legal analysis. There is no basis for us to intervene. I would, therefore, dismiss the appeal but, in these circumstances, without costs.

MacDonald, C.J.N.S.

Concurred in:

Oland, J.A.
Farrar, J.A.