

SUPREME COURT OF NOVA SCOTIA

Citation: Burrell v. Metropolitan Entertainment Group, 2010 NSSC 476

Date: 20101008

Docket: Hfx No. 274367

Registry: Halifax

Between:

Paul Burrell

Plaintiff as Respondent

v.

**Metropolitan Entertainment Group,
the Attorney General of Nova Scotia, and
Nova Scotia Gaming Corporation**

Defendants as Applicants

DECISION

Judge: The Honourable Justice John D. Murphy

Heard: September 28, 2010 in Halifax, Nova Scotia
{Oral decision rendered October 8, 2010}

Written Decision (Reasons): January 13, 2011

Counsel: Kent McNally, for Plaintiff
Carl Holm, Q.C. and Sean Foreman, on behalf of
Metropolitan Entertainment Group
Duane Eddy, on behalf of the Attorney General of N.S.
and N.S. Gaming Corporation

By the Court:

INTRODUCTION

[1] We are here this afternoon in the matter of Mr. Harold Paul Burrell versus Metropolitan Entertainment Group, the Attorney General of Nova Scotia and Nova Scotia Gaming Corporation.

[2] We are dealing with Motions for Summary Judgment on pleadings under *Civil Procedure Rule 13.03* brought by all of the Defendants. The Plaintiff's claim is set out in an Amended Notice of Action and Amended Statement of Claim which was issued in January of 2010.

BACKGROUND

[3] The general background is that the Plaintiff is a resident of Sydney who states that he is addicted to gambling. The Defendant Attorney General is responsible for developing and implementing legislation governing gaming and casino operation in Nova Scotia. In 1994 Nova Scotia enacted the *Gaming Control Act*, SNS 1994-95, c. 4 (as amended), and gaming in this province is conducted and managed in accordance with that Act and the Regulations which are made under it. Under the **Criminal Code** all gaming under the Act must be conducted and managed by the Province. The Defendant Nova Scotia Gaming Corporation is a crown corporation established by the *Gaming Control Act* with general duties which include developing, organizing, managing and operating casinos in the province. The Defendant Metropolitan Entertainment Group which I may refer to as "MEG" operates casinos in Nova Scotia pursuant to an agreement with the Nova Scotia Gaming Corporation.

[4] Mr. Burrell commenced this proceeding against the Defendants in December 2008 and as I indicated earlier, the claim is now advanced in an Amended Statement of Claim which was filed during January of this year, with some aspects further addressed in responses to demands for particulars. The Plaintiff seeks to recover damages from the Defendants including general damages for psychological, physical and emotional pain and suffering, depression, loss of amenities of life, indignity of impoverishment, loss of family unity and support,

loss of personal integrity and hope, as well as special damages, punitive, aggravated and exemplary damages.

[5] Mr. Burrell says that the essence of his claim is that he was a patron who gambled at Casino Nova Scotia in Sydney and that the Defendants jointly and severally owed to him a duty of care to ensure that appropriate steps were taken by those Defendants to prevent, or at the very least to minimize, his gambling actions in order to avoid harm to him. The Plaintiff maintains that the Defendants were further bound to abide by the duties and obligations statutorily imposed on them by the *Gaming Control Act*. Mr. Burrell says the Defendants failed in the exercise of those duties and because of that they were negligent in their actions or their omissions, as described in the pleadings, and that that caused or contributed to the damages which he sustained.

[6] The Plaintiff's claim is based on negligence. He says the Defendants failed to take reasonable care to prevent gambling at the casino from becoming a negative issue for him. He claims that it was reasonably foreseeable to the Defendants that his gambling could develop into an addiction which would cause him substantial harm, that proper safeguards were not implemented and followed by the Defendants.

[7] The Defendants maintain that the Amended Statement of Claim does not disclose a cause of action and is clearly unsustainable. They characterize the Plaintiff's claim as seeking recovery of economic losses alleged to have resulted from gaming activities. They seek summary judgment on the pleadings pursuant to *Civil Procedure Rule 13.03* which says in part:

13.03 [Summary judgment on pleadings]

(1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:

(a) it discloses no cause of action or basis for a defence or contest;...[and]

(c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

Subsection(3) of Rule 13.03 says that:

(3) A motion for summary judgment on the pleadings must be determined only on the pleadings, and no affidavit may be filed in support of or opposition to the motion.

[8] The principles to be applied on a motion for summary judgment on the pleadings are well settled and they're not disputed by the parties. As expressed by the Plaintiff, the burden of proof for summary judgment is initially on the Defendants as they are the parties bringing the motion, and the burden of proof they have is a high one. The Court should assume the facts stated in the pleadings can be proved and should only grant summary judgment if it is plain and obvious that the statement of claim discloses no reasonable cause of action. Only if the action is certain to fail should it be struck. I must consider the claim at its highest and assume all of the allegations to be true without the need to call evidence. Even with this assumption, it must be plain and obvious that the pleadings disclose no reasonable cause of action if I am to allow summary judgment; and a number of cases are referenced by the parties including **Body Shop Canada v. Dawn Carson Enterprises**, 2010 NSSC 25, the cases referenced in that decision, and also **Homburg Canada v. Halifax Regional Municipality**, 2003 NSCA 61.

[9] The Plaintiff in the Amended Statement of Claim and Answers to the Demand for Particulars states the following. He began gaming at Casino Nova Scotia in Sydney in 1995 and continued until 2004. He immediately became addicted to gambling. He was in consistent attendance and well known to casino employees, occasionally spending 48 hours at the casino. The Defendants allowed him to continue gambling and encouraged him by giving him small perks. He had access to funds from an ATM machine on the casino premises and was allowed to withdraw and spend large amounts of cash. He gambled away large amounts of money and was unable to make his mortgage payments, losing his house by foreclosure and he also lost his place and standing in the community. In 2004 the Plaintiff notified casino staff he was spending too much time and money there. After providing that advice, he was given a notice by the Defendant Metropolitan pursuant to the *Protection of Property Act*, RSNS, 1989 c. 363, to stay away from the casino. He gained access to the casino and gambled on one occasion after being given that notice and some extensions, and on that occasion he was asked to leave.

[10] The Plaintiff, Mr. Burrell, maintains the Statement of Claim discloses causes of action based upon first: negligent regulation and negligent promotion of gambling; secondly, breach of fiduciary duty; thirdly, failing to ensure the appropriate and sufficient governance and supervision of gambling industry in Nova Scotia; fourth, failure by the Defendant Province to ensure that the Defendant MEG completely discharged statutory duties which the Province delegated to it; and five, failure to detect that the Plaintiff was a gambling addict and to protect him from further harm once his addiction ought to have been known.

[11] The Plaintiff says the duty of care by the Defendants to the Plaintiff arises both by statute and under the evolving common law negligence principles.

[12] The Defendants say first, that there's no common law or private law duty of care by a casino operator to a gambler, absent either extraordinary circumstances such as active inducement by the operator, or self exclusion whereby a gamer requests that he be barred from the facility. The Defendants also say the governing statute law does not create a private duty of care or right of action based on an alleged breach of the *Gaming Control Act* or Regulations.

[13] I will deal first with the common law. No Canadian case has considered whether there's a broad common law duty of care to problem gamblers. The issue has been considered in other jurisdictions including the United Kingdom, Australia and the United States; and it has been held in those places that no such duty exists except in exceptional circumstances.

[14] I agree with the summary and analysis of relevant authority set out in paragraphs 41 to 80 of the Defendant MEG's brief. I am not going to go through that in detail here; the briefs of all parties will remain in the file, as they do under the new Rules, and they will be part of the record. The sections I have referenced will effectively be part of the reasons for my decision, and for ease of reference I will attach them to these reasons as Appendix 'A.'

[15] My conclusion is that the law does not support the existence of a broad duty of care to problem gamblers, applying the test from **Ann's v. Merton**, [1978] A.C. 728, **Cooper v. Hobart**, [2001] 3 S.C.R. 537, and **Edwards v. Law Society of Upper Canada**, [2001] 3 S.C.R. 562, decisions and the other cases referenced. The requirements of proximity and fairness necessary to support a common law duty upon casino operators to exercise the type of care the Plaintiff

contends should be afforded to problem gamblers are not present. The pleadings do not indicate that the Defendants did not respond to a self exclusion by Mr. Burrell in a way which would give rise to a duty of care. The revised Answer to the Demand for Particulars, the last component of the Plaintiff's pleading, indicates that when Mr. Burrell indicated he had a problem, he was given notice to stay away from the casino and only had short access on one occasion thereafter. Similarly, the sorts of unconscionable activity or inducements to attend which were identified in other cases as creating exceptional circumstances giving rise to a common law duty of care are not suggested by the pleadings to exist in this case.

[16] I have concluded that the Plaintiff's claim does not disclose a common law duty of care and that Mr. Burrell's claim is not supportable on that basis.

[17] With respect to the statutory duty of care, I accept the Crown Defendant's analysis of the law with respect to negligence of public authorities as set out at pages 4 to 11 of the Crown's brief, and I attach those pages as Appendix 'B.' After reviewing the cases cited, in the context of the *Gaming Control Act* and Regulations, I conclude that duties owed under the applicable legislation are to the public as a whole, and that Mr. Burrell has no special proximity to the regulator.

[18] Neither the Act nor the Regulations create or provide for a private law right of action based on a breach of the legislation. If a statutory breach occurs, the offender is subject to prosecution, but the breach does not constitute negligence *per se*. **Canada v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 43, addresses that issue.

[19] I agree with the Defendants that the causes of action which the Plaintiff maintains are advanced in the Statement of Claim are not supported by the legislation. The *Gaming Control Act* and Regulations give rise to public duty directed toward the public good. Individual legal rights are not created and liability in negligence generating a damages remedy is not established by the legislation.

[20] The purpose of the *Gaming Control Act*, as set out in section 2, is publicly oriented. No duty to the Plaintiff different from the general duty to the public as a whole is established by the Act. I reject the Plaintiff's position that a statute should be interpreted to create a private duty of care unless it is expressly precluded. Statutes are *prima facie* directed to the public good, and absent specific imposition

of a private duty of care should not ordinarily be construed as creating that type of relationship. The activities alleged by the Plaintiff do not constitute any failure by the Defendants to execute statutory obligations. The Defendants were exercising legislatively-delegated discretion. The Plaintiff's claim based upon regulatory negligence does not support a cause of action and is clearly unsustainable.

[21] Similarly, the Plaintiff's claim based on negligent promotion is unsustainable. The Province's decision to allow and regulate gambling in Nova Scotia was a policy decision, which did not give rise to private or individual liability. The duty asserted by the Plaintiff does not fall within the category of cases in which proximity has been recognized, nor where the relationship between the parties warrants extension in the interest of fairness and justice. The claim does not disclose a cause of action based upon breach of fiduciary duty. This case is readily distinguished from the **Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)** 2009 NSCA 44, decision which the Plaintiff cited. Unlike here, in that case the government had provided plaintiffs with information regarding the safety of their properties, which did engage a duty of loyalty. The claim for breach of fiduciary duty which was permitted to proceed in the **Cape Breton** case did not involve an alleged breach of fiduciary duty based upon statutory or regulatory function, which is before the Court in this case.

[22] Mr. Burrell's claim does not disclose a cause of action based upon a duty of care arising from statute. No duty of care to support the Plaintiff's claim rests upon the public authority Defendants, nor upon MEG as an agent of the public authority.

[23] I have concluded in the circumstances, based on the pleadings in this case, that it is plain and obvious that the Statement of Claim discloses no cause of action based upon either a common law or statutory duty of care owed by any of the Defendants to the Plaintiff. I have found that the Plaintiff's claims relating to regulatory negligence, negligent promotion, and breach of statutory duty are unsustainable. Therefore, it is not necessary that I address the Defendant's argument that the claim is unsustainable as being solely for economic loss, and I am not giving a ruling on that issue.

[24] The Defendants' Motions for Summary Judgment on the pleadings succeed, and the Plaintiff's claim is dismissed in its entirety.

[25] As indicated, the briefs will remain in the file and be part of the record. I invite the parties to try and reach agreement concerning costs. If you are unable to do so, you can make submissions in writing by the 15th of November; or if you need more time, let me know and I am sure we can arrange that. In the circumstances, I request Defence counsel to prepare the Orders. If there are any questions or any clarifications required by counsel, I will try and address them, but otherwise we will adjourn.

J.