Sinclair v New Zealand Racing Board

High Court Wellington CIV-2015-485-090; [2015] NZHC 2067
8 June; 28 August 2015
Brown J

Tort – Negligence – Duty of care – Foreseeability – Proximity – Policy – Causation – Strike out application – Problem gambler allegedly defrauding friend for betting funds – Problem gambler known to Racing Board – Previous convictions for fraudulently acquiring betting funds – Whether Racing Board failed to exercise reasonable care by excluding gambler from all betting – Racing Board's statutory responsibilities – No communications between friend and Racing Board – Gambling Act 2003, ss 309, 310, 317, 318, 319, 320, 321, 322, 323, 324 and 325 – Racing Act 2003, ss 5(1), 7, 8, 9, 9(1)(f), 9(3)(b), 52, 65, 65F, 65G, 65H, 65I, Part 6B – Racing (Harm Prevention and Minimisation) Regulations 2004, regs 5 and 6.

Ms Sinclair formed a friendship with Mr Monk in early 2010, unaware that he was a fraudster and a problem gambler. She described herself as a middle-aged, emotionally vulnerable, financially independent, single woman. Over a period of approximately one year Mr Monk prevailed upon Ms Sinclair to lend him a total of $141,080 in 86 separate transactions which, it was alleged, he spent in betting on horse races either by telephone or at various of the Board's venues.

Ms Sinclair claimed that Mr Monk was a recidivist self-confessed problem gambler which the New Zealand Racing Board knew, or ought to have known, well before Mr Monk's initial contact with her in 2010. She claimed that the Board also had knowledge of Mr Monk's history of criminal offending, and that he had used illegally obtained funds from credit betting facilities extended to him in breach of the Board's Harm Prevention and Minimisation Policy to bet, and was reckless in that knowledge.

Ms Sinclair sued the Board for reimbursement of the sum which she lent to Mr Monk, for damages for mental distress and for exemplary damages. She contended that the Board was negligent in failing to exercise reasonable care by excluding Mr Monk from betting. She claimed that the Board, through the owner/operators engaged by the TAB to run the Board's betting venues that were most frequently attended by Mr Monk, had sufficient ability to control Mr Monk's betting activities in a way that would have prevented the harm which Ms Sinclair eventually suffered. It was claimed that a special relationship had been established not only between the Board and Ms Sinclair but also between the Board and Mr Monk. The Board also had obligations imposed on it by regs 5 and 6 of the Racing (Harm Prevention and Minimisation) Regulations 2004 to prevent Mr Monk from betting. Further, the Board had adopted a Harm Prevention and Minimisation Policy which included taking action as required regarding problem gamblers, including the exclusion of

customers from Board outlets and refusing to accept bets from customers. In relation to Class 4 gambling areas, the Board had the power to issue exclusion orders under ss 309 and 310 of the Gambling Act.

The Board applied to strike out Ms Sinclair's claim on the ground that it disclosed no reasonably arguable cause of action. While acknowledging that the single pleaded negligence cause of action was novel, Ms Sinclair resisted the application, maintaining that her claim was reasonably arguable.

Held: 1 Given the Board's experience and knowledge of Mr Monk it was reasonably arguable that a reasonable person in the shoes of the Board would have foreseen the prospect that the sources of funds for Mr Monk's gambling activities might suffer loss from his continued betting if the Board failed to exercise the powers available to it (see [52]).

North Shore City Council v Attorney-General [2012] NZSC 49, [2012] 3 NZLR 341 applied.

2 The Board could not be held to owe Ms Sinclair a duty of care if she was at no particular risk when compared with the public generally; neither was she at special risk of injury at the hands of Mr Monk. The claim in this case amounted to the proposition that the Board owed a duty of care to any person who might happen to meet Mr Monk and fall victim to one of his schemes. In essence, that was a claim that a duty of care was owed to New Zealanders at large. Ms Sinclair was not a co-worker of Mr Monk nor did Mr Monk have control over her property in the nature of being a trustee. The best case that could be advanced was that Ms Sinclair was a member of the alleged delineated class. However, such a group of persons was not an identifiable and sufficiently delineated class. The class could not fairly be confined to females, and there was no sound basis for confining the "class" to those who were financially independent (see [87], [88], [89], [90]).

Couch v Attorney-General [2008] NZSC 45, [2008] 3 NZLR 725 applied.

Home Office v Dorset Yacht Co Ltd [1970] AC 1004, [1970] 2 All ER 294 (HL) applied.

3 The conclusion that there was no duty of care was supported by two policy factors: first, the Board could find itself in the position of indemnifier for all persons who lent money to problem gamblers, who then used that money to bet on racing; secondly, it was questionable whether the Board should be required to insure against the prospect of such a liability where the Board was already required to pay a gambling levy (see [96], [97]).

4 The real cause of Ms Sinclair's losses was her decision on numerous occasions to advance money to Mr Monk on an unsecured basis. Her real complaint was not that Mr Monk was not prevented from gambling by the Board but that Mr Monk did not repay the funds which she advanced to him (see [105]).

Fleming v Securities Commission [1995] 2 NZLR 514 (CA) applied.

Result: Application to strike out Ms Sinclair's claim granted.

Other cases mentioned in judgment

Anns v Merton London Borough Council [1978] AC 728, [1977] 2 All ER 492 (HL).

Attorney-General v McVeagh [1995] 1 NZLR 558 (CA).
Attorney-General v Prince and Gardner [1998] 1 NZLR 262 (CA).
Barrett v Enfield London Borough Council [2001] 2 AC 550, [1999] 3 All ER 193 (HL).
Bedfordshire County Council [1995] 2 AC 633, [1995] 3 All ER 353 (HL).
Calvert v William Hill Credit Ltd [2008] EWHC 454 (Ch).
Calvert v William Hill Credit Ltd [2008] EWCA Civ 1427, [2008] 2 WLR 1065.
Caparo Industries Ltd v Dickman [1990] UKHL 2, [1990] 2 AC 605.
Cooper v Hobart 2001 SCC 79, [2001] 3 SCR 537.
Foroughi v Star City Pty Ltd [2007] FCA 1503, 163 FCR 131.
Kakavas v Crown Ltd [2007] VSC 526.
Preston v Star City Pty Ltd [1999] NSWSC 1273.
Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360, [1999] 3 All ER 897 (HL).
Reynolds v Katoomba RSL All Services Club Ltd (2000) Aust Torts Reports 81-545 (63,545).
Reynolds v Katoomba RSL All Services Club Ltd [2001] NSWCA 234, (2001) 53 NSWLR 43.
Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd [2005] 1 NZLR 324 (CA).
Sew Hoy & Sons Ltd v Coopers & Lybrand [1996] 1 NZLR 392 (CA).
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd [1992] 2 NZLR 282 (CA).
Sullivan v Moody [2001] HCA 59, (2001) 207 CLR 562.
Tame v New South Wales [2002] HCA 35, (2002) 211 CLR 317.
X (Minors) v Bedfordshire County Council [1995] 2 AC 633, [1995] 3 All ER 353 (HL).

Application

The New Zealand Racing Board applied for an order striking out Ms Sinclair's claim against it.

JT Burley for the plaintiff.
RJ Gordon and *JR Caldwell* for the defendant.

Cur adv vult

BROWN J.

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Introduction

[1] The plaintiff, who described herself as a middle-aged, emotionally vulnerable, financially independent single woman,[1] formed a friendship with Leicester Monk in early 2010, unaware that he was a fraudster and a problem gambler. Over a period of approximately one year[2] he prevailed upon her to lend him a total of $141,080 in 86 separate transactions which it is alleged he spent in betting on horse races either by telephone or at various of the Board's venues.

[2] The plaintiff sues the Board for reimbursement of the sum which she lent to Mr Monk, for damages for mental distress and for exemplary damages, contending that the Board was negligent in failing to exercise reasonable care by excluding Mr Monk from all types of betting in the knowledge that he was a problem gambler and had defrauded others to obtain funds to fund his gambling habit.

[3] The Board applies to strike out the plaintiff's claim on the ground that it discloses no reasonably arguable cause of action against it. While acknowledging that the single pleaded negligence cause of action is novel, the plaintiff resists the application, maintaining that her claim is reasonably arguable.

Striking out principles

[4] It is common ground that the following principles apply:[3]

(a) Pleaded facts, whether or not admitted, are assumed to be true;

(b) The cause of action must be clearly untenable, that is, it cannot succeed;

(c) The jurisdiction to strike out is to be exercised sparingly and only in clear cases;

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1 Statement of claim para 79: see [8] below.
2 Between 22 March 2010 and 29 March 2011: Statement of claim para 12.
3 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

(d) That said, the jurisdiction is not excluded by the need to decide difficult questions of law, which may require extensive argument; and
(e) The Court should be slow to strike out claims in developing areas of law.

[5] Describing those as the principles applicable "in more usual cases", the plaintiff emphasises that the Court will be reluctant to strike out where the claim arises in a developing area of the law and where a duty of care is alleged in a new situation, drawing attention to the observation of Elias CJ and Anderson J in *Couch v Attorney-General*:[4]

> Particular care is required in areas where the law is confused or developing.

The pleadings

The statement of claim

[6] Although a solitary cause of action is pleaded, the statement of claim is a substantial document, spanning 40 pages and comprising 150 paragraphs. While the key paragraphs are set out in full below, I will endeavour to capture the balance of the pleading in summary form.

[7] After some introductory paragraphs referring to the statutory functions and income sources of the Board (paras 2–6), the statement of claim addresses matters under the following headings:

(a) the background/material facts (paras 7–32);
(b) Mr Monk's history of criminal offending and the Board's knowledge of his use of fraudulently acquired betting funds (paras 33–50);
(c) credit betting incident at Karangahape Road TAB branch in 2002 (paras 51–65);
(d) the Board's monitoring of betting activities (paras 66–78).

[8] Then, under the heading "Special relationship between the Plaintiff and Board and the resulting risk to the Plaintiff", paras 79–81 read:

> 79. At the time of her initial encounter with LM in March 2010, the Plaintiff was a middle aged, emotionally vulnerable, financially independent single woman, as had been prior victims of LM, including Elaine Dallimore, Margaret Wood, Margaret Hawkins, Lucy Smith and Jennifer Parsons, a number of whom, in addition to the Plaintiff, including Elaine Dallimore, Margaret Wood and Jennifer Parsons, were also complainants to Police which resulted in LM's most recent conviction in February 2013.
> 80. As an older well-educated single man, with a long history of criminal offending for fraud, LM used his charm and intelligence to lure unsuspecting female victims, including the Plaintiff, into various fraudulent schemes to fuel his problem gambling habit.
> 81. Prior to his imprisonment in February 2013, LM was a recidivist self-confessed problem gambler which the Defendant knew, or ought to have known, well before Mr Monk's initial contact with the Plaintiff in March 2010. The Defendant also had knowledge of LM's

4 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

long history of criminal offending, and that he had used illegally obtained funds from credit betting facilities extended to him in breach of the HP&M Policy (after December 2007) to bet, and was reckless in that knowledge. The Defendant also knew that LM had been imprisoned for fraud.

[9] Following para 82, which addresses in significant detail why the plaintiff was the subject of a distinct and special risk of being harmed by Mr Monk, paras 83–85 state:

> 83. LM's ability to continue betting, even as a self-confessed problem gambler after 2002, made the Plaintiff a predictable target for LM given his propensity to obtain money to fund his problem gambling from persons with the same characteristics/interests as himself, including the Plaintiff, over an extended period of time. Anyone with these same characteristics and interests, including the Plaintiff, was at greater risk than members of the general public, given their increased vulnerability in light of LM's modus operandi for offending by using his charm, intelligence and persuasion in a dishonest and criminal way.
>
> 84. The Defendant, through the owner/operators engaged by the TAB to run the Defendant's betting venues that were most frequently attended by LM, had sufficient power and ability to control LM's betting activities in a way that would have prevented the harm which the Plaintiff eventually suffered at his hands, thereby creating a special relationship not only between the Defendant and the Plaintiff but also between the Defendant and LM.
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> 85. Over time, and in particular after the Karangahape Road incident, the Defendant was in possession of further information which confirmed that LM had encouraged breaches of the Defendant's own policy prohibiting credit betting by its staff and contracted agents, because he did not have the funds to place cash bets from time to time. This breach was foreseeable by the Defendant as likely to cause harm to the Plaintiff as a member of the class of persons pleaded in paragraphs 79 and 80, thereby satisfying the requisite proximity between the Plaintiff and the Defendant.

[10] With reference to the "characteristics/interests" referred to in para 83, para 32 alleges that the plaintiff and Mr Monk had a common interest in various sports, including rugby and cricket, as well as in English literature, which shared interests Mr Monk deliberately exploited throughout the entire period that he received money from the plaintiff.

[11] There then follows the pleading of the duty of care claimed to be owed to the plaintiff:

> 86. Given the specific nature of the risk which LM posed to the Plaintiff in light of his numerous convictions for fraud, and where he had defrauded the Defendant itself on at least two occasions known to the Defendant in 1988 and 2002, the Defendant (having the ability to eliminate that risk) had a duty of care to the Plaintiff, the fulfilment of which required the reasonable and consistent exercise of the Defendant's power and capability to control LM's problem gambling activities.

87. In particular, the discussion between LM and Mr Alpe for the Defendant immediately following the Karangahape Road incident regarding LM's admitted problem gambling, and between Mr Alpe and Rosemary Ayers in 2008 at the commencement of the Police's formal investigation of LM following multiple complaints of fraud as pleaded in paragraphs 33 to 34, significantly heightened the obligation on the Defendant to take appropriate steps at that time to control LM's problem gambling, including prohibiting him from all betting well before it did on 22 June 2011.
88. In all the foregoing circumstances the Defendant was in a special relationship to the delineated class described in paragraph 79, including the Plaintiff, and as a consequence, owed the Plaintiff a duty of care to prevent the harm suffered by her arising from the foreseeable criminal conduct of LM, that was not owed to members of the general public.
89. The principal responsibility of the Defendant to have protected the Plaintiff from harm, including the economic harm caused to her by LM as a direct result of his continued criminal offending against her (and others) derived from the Defendant's capacity to control LM's betting activities in response to LM's problem gambling, which the Defendant was directly responsible for controlling by any of the means pleaded in paragraphs 62, 66 and 67 in the performance of its statutory responsibilities pleaded in paragraphs 97–123 and 129–130 below.

[12] Reverting to the summary description, the statement of claim then addresses:

(a) Breach of duty of care by the Board (para 90);
(b) Causation (para 91);
(c) Policy factors in favour of recognition of the Board's duty of care to the plaintiff:
    (i) The legislative environment (paras 92–106);
    (ii) The Gambling Act 2003 (paras 107–131);
(d) Assumed responsibility and the Board's control over Mr Monk (paras 132–143);
(e) Exemplary damages (paras 144–147);
(f) General/aggravated damages (paras 148–149).

[13] The pleading concludes with the cause of action:

Cause of Action: Negligence

150. The Plaintiff repeats paragraphs 1–91 and says that the Defendant was negligent in failing to exercise reasonable care by excluding LM from all types of betting in the knowledge that he was a problem gambler and had defrauded a number of individuals, including the Plaintiff, to obtain funds to fund his gambling habit. The Defendant owed the Plaintiff a duty of care as pleaded in paragraphs 86–89 which the Defendant breached therefore causing harm including economic harm to the Plaintiff.

The strike out application

[14] The primary focus of the Board's application was its contention that it owed no duty of care to the plaintiff. In addition, however, it contended that on the issue of causation there were insurmountable hurdles to the plaintiff's claim.

[15] Furthermore the Board observed that, where a duty of care (and breach of the same) can be established as well as the necessary causation, there may still be consequences for which the Board should not reasonably be held liable. However the Board recognised that the several issues which it raised in the context of remoteness of loss could not be answered in a strike out context.

[16] Consequently the main focus of argument was on the existence of a duty of care with absence of causation advanced as a second challenge to the establishment of a reasonably arguable cause of action.

The nature of the claim

[17] The statement of claim does not allege that there was any communication between the plaintiff and the Board or any other conduct on the part of the Board vis-à-vis the plaintiff which would invite the conclusion that there was a voluntary assumption of responsibility by the Board for loss suffered by the plaintiff through the actions of third parties. A reference to "assumed responsibility" appears in the statement of claim only in para 132 which states:

> As pleaded in paragraph 89, the Defendant specifically assumed responsibility to ensure that its statutory functions as prescribed in Section 9 of the Racing Act were appropriately delivered ultimately for the benefit of the Plaintiff as a member of the group of people who were the subject of the distinct and special risk of suffering harm of the kind the Plaintiff suffered at the hands of LM.

[18] The statutory footing of the claim was apparent from Mr Burley's helpful encapsulation of the claim in his written submissions:

> The overlay application of public policy considerations in determining whether a common law duty of care in respect of the actions and/or omissions of a public body exists, submit, on a case to case basis, is also a feature of the Supreme Court's deliberations in *Couch*, and is clearly relevant to the contended duty of care in this case, particularly in light of broader view expressed by the President and Anderson J as to the width of the class of potentially affected people of (sic) statutory responsibilities are negligently discharged in terms of foreseeability of risk, where the public body is performing a role for the benefit of the community at large, and in cases where the actions of a third party are the immediate cause of the plaintiff's loss.

[19] It is well-established now that a duty of care may arise through the exercise or existence of statutory duties or powers. They may create a sufficient relationship between the statutory authority and a person suffering harm as a result.[5]

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5 *Couch v Attorney-General*, n 4 above, at [60]. However, as Mr Burley emphasised with reference to his point at [5] above, the minority in *Couch* noted at [33] that in both *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) and *Barrett v Enfield London Borough Council* [2001] 2 AC 550 (HL) liability in negligence for the exercise or non-exercise of a statutory duty or power was identified as a confused and developing area of law in respect of which particular care is required in entertaining a strike out application.

[20] With reference to the statutory imposition of responsibility the minority in *Couch* commented as follows:[6]

> [62] Liability in negligence arises where a defendant has assumed a responsibility to protect the plaintiff from injury, including at the hands of a third party. Such assumption of responsibility is illustrated by the case where a decorator failed to follow instructions to lock the door when he left the house where he was working, leaving it vulnerable to burglary. If voluntary assumption of responsibility can give rise to sufficient proximity, it would seem odd if statutory imposition of responsibility is wholly irrelevant to the judgment whether there is a duty of care. We do not think it can be. In some cases such responsibility may be determinative. In others it may be simply one of the circumstances to be weighed. Key to the ultimate assessment will be the purpose of the statute and the ability of individuals to protect themselves from harm of the sort suffered.
>
> ...
>
> [65] ... We accept that proximity between a statutory body and a plaintiff who has suffered harm is not readily to be assumed whenever statutory duties and powers could reasonably have been used to avoid foreseeable loss. But the statutory obligation is we think highly relevant to the judgment of sufficient proximity between plaintiff and statutory authority to give rise to an actionable duty of care. And in some cases, particularly those where individuals cannot reasonably protect themselves from risk which a statutory body has a duty to abate or manage, we consider that sufficient proximity may well follow from the statutory obligations.

[21] Paragraph 89[7] of the pleading of the asserted duty of care specifically alleges a responsibility on the part of the Board for the control of Mr Monk's problem gambling in the performance of statutory responsibilities pleaded in paras 97–123 and 129–130.

The statutory context

[22] The Board is a statutory body established under s 7 of the Racing Act 2003 having three objectives:[8]

(a) to promote the racing industry; and
(b) to facilitate and promote racing betting and sports betting; and
(c) to maximise its profits for the long-term benefit of New Zealand racing.

[23] The functions of the Board set out in s 9 include:

(a) to develop policies that are conducive to the overall economic development of the racing industry, and the economic well-being of people who, and organisations which, derive their livelihoods from racing:
(b) ...
(c) to conduct racing betting and sports betting, and make rules relating to betting, under Part 6:

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6 *Couch v Attorney-General*, above n 4 (citations omitted).
7 At [11] above.
8 Racing Act 2003, s 8.

(d) to distribute funds obtained from betting to the racing codes in accordance with sections 16 and 17:

(e) ...

(f) to develop or implement, or arrange for the development or implementation of, programmes for the purposes of reducing problem gambling and minimising the effects of that gambling:

(g) ...

(h) to use its resources, including financial, technical, physical, and human resources, for purposes that, in the opinion of the Board, will directly or indirectly benefit New Zealand racing:

...

In carrying out its functions the Board must exhibit a sense of social responsibility by having regard to the interests of the community in which it operates.[9]

[24] Section 52 of the Racing Act empowers the Board to make (and to alter and revoke) rules providing for the establishment of a system of racing betting and providing for any matter relating to the conduct and operation of racing betting by the Board. Section 65 provides that the Board or any racing club may refuse to accept all or any part of a bet without giving any reason for doing so.

[25] Part 6B of the Racing Act 2003 headed "Harm prevention and minimisation" was introduced in 2003.[10] It provides for the payment by the Board of a problem gambling levy in accordance with ss 317–325 of the Gambling Act 2003.[11]

[26] Part 6B includes several provisions empowering the making of regulations. The first such provision is s 65F which empowers the making of regulations for purposes including:

(d) requiring the Board to provide problem gambling awareness training for employees involved in supervising racing betting and sports betting at Board venues; and

(f) prescribing any other requirements relating to harm prevention or minimisation.

[27] Definitions of "harm" and "problem gambler" were included in s 5(1), by means of cross references to the Gambling Act 2003, namely:

harm—

(a) means harm or distress of any kind arising from, or caused or exacerbated by, a person's gambling; and

(b) includes personal, social, or economic harm suffered—

(i) by the person; or

(ii) the person's spouse, partner, family, whanau, or wider community; or

(iii) in the workplace; or

(iv) by society at large

problem gambler means a person whose gambling causes

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9 Racing Act 2003, s 9(3)(b).
10 By the Gambling Act 2003.
11 Section 65I.

harm or may cause harm

[28] The Racing (Harm Prevention and Minimisation) Regulations 2004 include the following provisions:

> **5 Requirement to provide information about problem gambling –** The Board must, at each Board venue, display signage that is clearly visible to players that—
>
> (a) encourages players to gamble only at levels they can afford; and
>
> (b) contains advice about how to seek assistance for problem gambling.
>
> **6 Requirement to provide problem gambling awareness training –** (1) The Board must provide problem gambling awareness training to each employee who is involved in supervising racing betting or sports betting at a Board venue.
>
> (2) As a minimum, the training referred to in subclause (1) must enable the employee to whom the training has been provided to—
>
> (a) approach a player that the employee has reasonable grounds to believe may be experiencing difficulties relating to gambling:
>
> (b) provide information to a player about the characteristics of problem gambling (including recognised signs of problem gambling):
>
> (c) provide information to a player about the potential risks and consequences of problem gambling:
>
> (d) provide information to a player about how to access problem gambling services:
>
> (e) remind a player that the Board may refuse to accept a bet under section 65 of the Act.

[29] Part 6B also includes s 65G (Regulations relating to admission to and exclusion from Board venues) and s 65H (Regulations relating to exclusion of problem gamblers from Board venues and race courses). However no regulations have been promulgated under either section.

Subsequent clarification of confusion at the hearing

[30] At the hearing there was a degree of confusion concerning the nature of the Board's power to exclude identified problem gamblers at the material time.

[31] The confusion related first to the Board's Harm Prevention and Minimisation Policy ("HP&M Policy") which first came into effect in December 2007. The alleged salient features of the HP&M Policy, which are recited at para 49 of the statement of claim, included para 4.6 in the following terms:

> An exclusion order must be issued, under section 310 of the Gambling Act 2003, to a self-identified problem gambler who makes a request for the issue of such an order. An exclusion order must be issued under section 309 of the Gambling Act to any person identified under that section as a problem gambler.

There was uncertainty as to the date at which that paragraph was introduced into the HP&M Policy wording.

[32] The second aspect of the confusion arose from the reference in para 89 of the statement of claim to the Board's means of controlling problem gambling as alleged in para 62, namely:

> 62. Pursuant to [the HP&M] Policy, an Exclusion Order must be issued under Section 309 of the Gambling Act to any person identified as a "problem gambler". Customers of the Defendant can also elect to be excluded on request for the issue of such an Order under Section 310 of the Gambling Act.

[33] The confusion was compounded by the fact that a document headed "Exclusion Order" was issued to Mr Monk by the Board on 17 January 2012 in the following terms:[12]

> In accordance with: (delete one)
>
> - Section 309 (person identified by venue staff and declines to self-exclude);
> - Section 310 (self-exclusion);
>
> of the Gambling Act 2003, this notice serves as advice that you are not permitted to enter the gambling area of the premises known as TAB FLATBUSH situated at UNIT 18, 302 TE IRIRANGI DRIVE, FLATBUSH, MANUKAU for a period of 24 months (3 months – 2 years), effective from the date of this notice.

[34] Previously on 22 June 2011[13] the Board had sent a letter to Mr Monk stating:

> Due to your public admission of Problem Gambling issues the New Zealand Racing Board has made a decision that we no longer wish to accept any business from you.
>
> To this end we will be taking steps to prevent you from being served at our TAB outlets and also from operating any future betting accounts.
>
> Enclosed with this letter are details of Problem Gambling support providers. We encourage you to avail yourself of their assistance.

[35] Leave was reserved to file supplementary submissions on two matters:

(a) the content of the HP&M Policy that preceded the September 2012 version; and

(b) the basis on which at the material time the Board could avail itself of the exclusion mechanism for identified problem gamblers reflected in the 17 January 2012 Exclusion Order.

[36] Four versions of the HP&M Policy were in evidence, dated December 2007, June 2010, August 2011 and September 2012. It was the third of those versions[14] which first made specific mention of ss 309 and 310 of the Gambling Act.

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12 Referred to at para 42 of the statement of claim.
13 Recited at para 41 of the statement of claim.
14 Subsequent to the period of the plaintiff's advances: see n 2 above.

[37] Sections 309 and 310 give certain powers for the exclusion of identified problem gamblers from the gambling areas of Class 4 venues or casino venues.[15] In his memorandum of 18 June 2015 Mr Gordon explained:

> 6. Racing betting and sports betting are not Class 4 gambling. (Nor, self-evidently, are TABs categorised as casinos). As such, the short answer is that section 309 and section 310 of the Gambling Act were not (and are not) effective to empower the Board to "*prohibit [Mr Monk] from all forms of betting*" – which is the essential breach of the alleged duty of care that is being asserted by Ms Sinclair (refer paragraphs 76, 87, 90.1, 90.2 and 143 of the statement of claim). Simply put, Part 4, sub-part 2 of the Gambling Act does not have broader application that goes beyond Class 4 gambling, or casinos.
> 7. In addition to this answer, however, some further detail also seems potentially relevant (and in the interests of completeness is added here). The Board has historically had some gaming machines located in defined Class 4 areas within some of its TAB Branches and TAB Agencies. Historically, those machines were owned and operated by community trusts (being the Lion Foundation and the Trusts Charitable Foundation). The relevant gaming trust held the Class 4 operator's licence under the Gambling Act, and it also held the individual venue licences for those areas within TAB premises where its gaming machines were located. However, the venue managers were either Board employees (in the case of TAB Branches) or employees of the relevant agency (in the case of TAB Agencies).
> 8. In 2011, the Board made application to the Secretary for Internal Affairs for a Class 4 operator's licence, so as to be able to conduct such gambling in its own right. That application was approved on 9 August 2011. The Board currently has defined Class 4 gambling areas located within 35 of its TAB venues (and it now holds the individual venue licences for the same). The TAB Agency located at Flatbush is one such venue.
> 9. As matters stood at the time of the "Exclusion Order" document (which was on 17 January 2012), section 309 of the Act would appear to have been the more correct route for any issue of an exclusion order to Mr Monk – ie the venue manager would by then have had "*reasonable grounds to believe*" he was a problem gambler. That said, even if the powers of exclusion in section 309 and section 310 of the Gambling Act were potentially available prior to 9 August 2011 (ie because a particular venue manager was employed by the Board (which would not be the case for TAB Agencies)), those exclusion powers:
>
> (a) Could only have potential application in respect of the minority of TAB venues where "pokie" machines were installed and such Class 4 gambling occurred; and
>
> (b) Only applied to the Class 4 "*gambling area*" (as defined in section 4 of the Gambling Act) within such a venue.

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15 Class 4 gambling involves the use of gaming (or "pokie") machines.

[38] Mr Burley filed a reply submission dated 24 June 2015 to which Mr Gordon took objection in a further memorandum dated 25 June 2015 on the grounds that the reply went beyond the limits of the leave reserved. I do not find it necessary to rule on that exchange.

[39] Suffice to say that, with the benefit of clarification, it is apparent that at the point in time prior to the period when the plaintiff formed a relationship with Mr Monk and made the several advances of funds to him:

(a) the Board had the power to refuse to accept a bet;[16]

(b) the Board had the obligations imposed by regs 5 and 6 of the Racing (Harm Prevention and Minimisation) Regulations 2004;[17]

(c) the Board had adopted an HP&M Policy which included taking action as required regarding problem gamblers, including the exclusion of customers from Board outlets and refusing to accept bets from customers;

(d) in relation only to Class 4 gambling areas, the Board had the power to issue exclusion orders under ss 309 and 310 of the Gambling Act.

A point of factual dispute

[40] Another of the means of control alleged to have been available to the Board was detailed in para 66 which reads:[18]

> 66. In addition to on-site CCTV cameras operated by the Defendant at its retail outlets for the purposes of the HP&M Policy, the Defendant also operates a "*red flags*" system to alert TAB outlet management to the activities of potential problem gamblers, in live time. Footage from the CCTV cameras is monitored from the Defendant's Head Office in Wellington on a daily basis, with alerts being brought up automatically when bets of $1,000 or more, at a time, are placed. The red flags system involves telephone contact being made with the branch on activation of the alert, or where the CCTV cameras identify large betters, again in real time.

[41] While accepting that in a strike out application the Court proceeds on the assumption that allegations contained in a statement of claim can be proven, the Board submitted that the Court is not prevented from striking out a case involving a disputed factual matter where the factual assertion is so clearly untenable that it can have no prospect of success, citing *Attorney-General v McVeagh*.[19] The Court of Appeal there recognised the possibility that an essential factual allegation might be so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[42] The Board observed that the assertion in para 66 was made notwithstanding that the plaintiff had never been privy to the Board's confidential wagering or CCTV security systems. In reliance on an affidavit of the Board's Head of Investigation, Risk and Assurance, Mr Gordon submitted

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16 Section 65 at [24] above.
17 At [28] above.
18 And the subject of cross-reference in para 89 at [11] above.
19 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

that the Board does not have the technical capability sought to be attributed to it. In particular it was submitted that the Board does not use the CCTV coverage available to it for the purpose contended in the pleading.

[43] For the plaintiff Mr Burley maintained that the CCTV camera capacity was a live evidential issue for trial and that the Court should not proceed upon the basis proposed by the Board.

[44] It may be that the plaintiff has a somewhat optimistic view of the capability of the Board's CCTV camera facility. However I accept Mr Burley's submission that it is not appropriate to consider the strike out of the plaintiff's claim on the basis of a finding against her on a contested evidential issue. Consequently I decline to proceed as Mr Gordon proposed.

Methodology for determining whether a duty of care exists

[45] The Board submitted that the courts have found it helpful to divide the inquiry, whether a duty of care might arise in a novel situation, into two stages:[20]

(a) whether the Board should reasonably have foreseen injury to his or her "neighbour" in the sense of a person who is closely and proximately affected by the Board's own conduct; and

(b) any broader policy considerations which ought to negate or limit the scope of the alleged duty of care (or the class of persons to whom the alleged duty is said to be owed).

[46] That analysis now needs to be read in the light of the judgment of Blanchard, McGrath and William Young JJ in *North Shore City Council v Attorney-General*, in particular the section headed "Duty of care – methodology".[21] That judgment reviewed the relevant history, including:

(a) the two-stage formulation in *Anns v Merton London Borough Council*;[22]

(b) the change in the United Kingdom in *Caparo Industries Ltd v Dickman*;[23]

(c) the Canadian approach in *Cooper v Hobart*;[24]

(d) the criticism of *Caparo* in Australia in *Sullivan v Moody*.[25]

[47] The judgment then turned to address the relevant factors "in the context of an *Anns/Caparo/South Pacific* framework" as follows:[26]

> As to that framework, it seems to us that it must amount to the same thing whether stated as having two stages (one of which has two parts) or as three stages. The important insight found in Canadian and New Zealand cases is that when a court is considering foreseeability and proximity, it is concerned with everything bearing upon the relationship between the

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20 *Citing South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) and *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

21 *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341 at [147]–[161].

22 *Anns v Merton London Borough Council* [1978] AC 728 (HL).

23 *Caparo Industries Ltd v Dickman* [1990] UKHL 2, [1990] 2 AC 605.

24 *Cooper v Hobart* 2001 SCC 79, [2001] 2 SCR 537.

25 *Sullivan v Moody* [2001] HCA 59, (2001) 207 CLR 562.

26 At [156].

parties and that, when it moves to whether there are policy features pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally. But, as already remarked, aspects of some matters may require to be considered more than once.

[48] After briefly addressing foreseeability, proximity and policy (the relevant passages are noted in the context of the discussion of those considerations below) the Court said:[27]

> In embarking upon an assessment of whether a duty of care existed, or in relation to a strike out application, may be capable of being shown to exist, it is of the utmost importance to identify and consider the salient features of the case which should properly determine that question. If that is adequately done the exact methodology employed should not be of paramount importance. It is worth remembering Cooke P's precept in *South Pacific*:
>
> > A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tacking a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever the formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

[49] I propose to analyse the claim under the headings foreseeability, proximity and policy before turning to address the causation argument.

Foreseeability

[50] Foreseeability of harm is the starting point, being a necessary, but not sufficient, condition for a duty to be recognised.[28] As explained in *North Shore*:[29]

> Where the person who has suffered an injury or loss asserts that the defendant owed a duty of care in a novel situation – one which falls outside an established category – it will naturally remain necessary to satisfy the court that the loss was a reasonably foreseeable consequence of the plaintiff's act or omission. But that will rarely, if ever, be determinative in such cases. McLachlin CJ observed for the Court in *Imperial Tobacco* that:
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> > ... not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.
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> Foreseeability is in such novel cases at best a screening mechanism, to exclude claims which must obviously fail because no reasonable person in

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27 At [161].
28 *Tame v New South Wales* [2002] HCA 35, (2002) 211 CLR 317 at [103].
29 *North Shore City Council v Attorney-General*, above n 21, at [157].

the shoes of the defendant would have foreseen the loss. The law would then regard the loss as such an unlikely result of the plaintiff's act or omission that it would not be fair to impose liability even if that act or omission were actually a cause, or even the sole cause, of the loss.

[51] In contending that there was a lack of foreseeability of loss to the plaintiff, Mr Gordon focused on the allegations in paras 83–85 of the claim[30] directed to the proposition that the plaintiff was "a predictable target" for Mr Monk. His argument was that to assert a legal liability on such a basis involved pre-supposing that, out of the hundreds of thousands of TAB customers across the country, the Board specifically knew of Mr Monk's characteristics/interests and, somehow knowing that, that it was reasonably foreseeable to the Board:

(a) That Mr Monk would continue to gamble, but only at the TAB (not in any other way, at any other venue or with any other betting organisation);

(b) That while continuing to gamble at the TAB, Mr Monk would be unable to fund some or all of this expenditure from his own resources;

(c) That rather than limiting this gambling activity, or borrowing money from elsewhere (such as a bank), or even seeking to credit bet; Mr Monk would instead devise an ultimately criminal scheme to gain loan advances from "*middle aged, emotionally vulnerable, financially independent single women*" (or "*people*");

(d) That Mr Monk would meet Ms Sinclair by chance at a carwash;

(e) That a romantic relationship would develop between Ms Sinclair and Mr Monk thereafter (and also, at this point, that the Board somehow knew Ms Sinclair's shared personal characteristics/interests with him);

(f) That while Ms Sinclair would normally be a strong/formidable woman, at that particular point in time she would instead be "*extremely down*", "*vulnerable*" and have "*no self-confidence*";

(g) That Mr Monk would ask to borrow money from Ms Sinclair;

(h) That Ms Sinclair would agree to advance (on an unsecured basis) all of the loans that Mr Monk sought from her – on 86 separate occasions, against her better judgment, and seemingly in the knowledge of his chequered past (but deciding to trust him nonetheless);

(i) That Mr Monk would use every cent of the money borrowed from Ms Sinclair to gamble at the TAB, but not gamble in any of the other ways open to him – and not spend the money on any other purpose either;

(j) That Mr Monk would achieve a 0% return whenever he gambled at the TAB using money borrowed from Ms Sinclair; and/or

(k) That irrespective of what Mr Monk did or did not do with any particular loan advance made to him by Ms Sinclair; he would not otherwise repay in full the debts that he owed to her.

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30 At [9] above.

Observing that that sequence was long and disjointed, Mr Gordon submitted that the claim was not reasonably arguable because such a risk was not reasonably foreseeable.

[52] In my view a number of the points emphasised for the defendant are more pertinent to the issue of proximity than foreseeability of harm. In any event, given the Board's experience and knowledge of Mr Monk it is reasonably arguable that a reasonable person in the shoes of the Board would have foreseen the prospect that the sources of funds for Mr Monk's gambling activities might suffer loss from his continued betting if the Board failed to exercise the powers available to it.

[53] Consequently I do not consider it appropriate to reject the claim at the screening mechanism stage as being one which must obviously fail on foreseeability of loss.

Proximity

[54] On this issue the joint judgment in *North Shore* said:[31]

> Assuming foreseeability is established in a novel situation, the court must then address the more difficult question of whether the foreseeable loss occurred within a relationship that was sufficiently proximate. This is usually the hardest part of the inquiry, for as Lord Bingham said in *Customs and Excise Commissioners v Barclays Bank plc*, the concept of proximity is "notoriously elusive". He was speaking of claims for economic loss but, in New Zealand at least, because of our no-fault accident compensation scheme, the majority of novel claims are of this character and those that are not will be sufficiently unusual as to raise comparable difficulties. Lord Oliver said in *Alcock v Chief Constable of South Yorkshire* that the concept of proximity is an artificial one which depends more on the court's perception of what is a reasonable area for the imposition of liability than upon any logical process of analogical deduction. An examination of proximity requires the court to consider the closeness of the connection between the parties. It is, to paraphrase Professor Todd, a means of identifying whether the defendant was someone most appropriately placed to take care in the avoidance of damage to the plaintiff.
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> Richardson J has observed that the concept of proximity enables the balancing of the moral claims of the parties: the plaintiff's claim for compensation for avoidable harm and the defendant's claim to be protected from an undue burden of legal responsibility. A particular concern will be whether a finding of liability will create disproportion between the defendant's carelessness and the actual form of loss suffered by the plaintiff. Another concern is whether it will expose the defendant and others in the position of the defendant to an indeterminate liability. The latter consideration may, however, be better examined at the second stage of the inquiry: whether the finding of a duty of care will lead to similar claims from other persons who have suffered, or will in the future suffer, losses of the same kind, but who may not presently be able to be identified.

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31 At [158]–[159].

[55] Notwithstanding Lord Oliver's observation in *Alcock*, as the minority in *Couch* stated, whether a defendant is under a duty of care to a plaintiff is a matter of judgment arrived at principally by analogy with existing cases.[32] The researches of counsel did not unearth any decision in the common law jurisdictions in which a claim was entertained for negligence brought by a third party against a betting organisation for the recovery of losses resulting from the third party's dealings with a problem gambler. However a number of judgments have engaged with a claim by a problem gambler against a betting organisation. Understandably the Board sought to employ the reasoning in those decisions as being potentially useful in the analysis of a "once-removed" claim by a third party for loss suffered in transactions with the problem gambler.

Australian decisions

[56] The earliest relevant decision is *Reynolds v Katoomba RSL All Services Club Ltd*[33] which involved a claim against an RSL club to recover losses which the plaintiff incurred while gambling on poker machines in the club's premises. Despite the club being advised that the plaintiff was a problem gambler and being requested not to cash his cheques or extend credit, no steps were taken to prevent him gambling and cheques continued to be cashed by the club. The claim was dismissed, as was the appeal to the New South Wales Court of Appeal discussed below.

[57] *Reynolds* was distinguished in the context of a strike out application in *Preston v Star City Pty Ltd*[34] where Wood CJ observed that at the heart of Mr Preston's claim was his circumstance of being a problem gambler who was susceptible to alcohol. The significance of that latter factor is evident in the following passages in the judgment:

> [132] It is certainly arguable that any duty of care in this context would not go so far as to require the warning off or the declining of the business of high rollers or gamblers who regularly lose, or denying to them facilities available to gamblers at large, including those permitted under the legislation and regulations. It may also not go so far as preventing the offer of a limited or reasonable range of inducements and complementary services. At a minimum, however, I am of the view that it is strongly arguable that it would extend to a prohibition on the provision of further liquor to a problem gambler, who is seen to be intoxicated, or to be behaving in a manner that is obviously totally rash, as well as to the "spiking" or "switching" of his drinks. Equally arguable, in my view, is its extension to 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.
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> [133] So restricted, this would not prevent casinos from dealing with high rollers, or even with gamblers who are known to have a strong gambling habit, so long as those dealings are fair and so long as those gamblers are not unduly or improperly pressured or encouraged into gambling in a way

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32 *Couch v Attorney-General*, above n 4, at [48].
33 *Reynolds v Katoomba RSL All Services Club Ltd* (2000) Aust Torts Reports 81-545 (63,545).
34 *Preston v Star City Pty Ltd* [1999] NSWSC 1273.

> that is obviously reckless and potentially destructive of themselves and their families. I do not decide, at this stage, that the duty of care will necessarily be formulated in these terms. I hold only that such a case is well arguable, and cannot be dismissed as untenable.

[58] On appeal in *Reynolds*[35] Spigelman CJ stated that the Court should be very slow indeed to recognise a duty to prevent self-inflicted economic loss. Loss of money by way of gambling was seen as an inherent risk in the activity which cannot be avoided. Observing that the only feature of the case which could create a duty of care arose from the express knowledge on the part of the club of the plaintiff's gambling problem and that there had been express requests made to the club not to permit the plaintiff to cash cheques, Spigelman CJ stated:

> [46] This knowledge of vulnerability must be placed in a context that the duty is to prevent the self-infliction of harm by an individual whose autonomy the common law respects. It is also to be placed in the context where the appellant had available to him other means of obtaining cash, perhaps not as immediate or convenient, but other means did exist. Furthermore, other clubs and forms of gambling were available to him.
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> ...
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> [48] It may well be that the appellant found it difficult, even impossible, to control his urge to continue gambling beyond the point of prudence. However, there was nothing which prevented him staying away from the club. The suggested duty on the club to advise him to resign his membership emphasises the point. He could have resigned at any time. The requests to refuse to cash cheques when asked, did not shift his personal responsibility for his own actions to the club. There was no reason for the club to honour one request rather than the other.

[59] *Reynolds* was followed in *Foroughi v Star City Pty Ltd*[36] where Mr Foroughi had requested and obtained an order under s 79(3) of the Casino Control Act 1992 (NSW) for a voluntary exclusion order prohibiting his entering or remaining in a casino. Having breached that order he then sought to recover from Star City his substantial gambling losses. The claim was dismissed by Jacobson J for reasons which included that Star City owed no duty of care to Mr Foroughi.

[60] *Reynolds* was also followed in *Kakavas v Crown Ltd*[37] where a problem gambler's cause of action in negligence was struck out along with causes of action alleging misleading and deceptive conduct and seeking restitution. However another cause of action labelled "unconscionable conduct", which concerned allegations that the casino had deliberately set out to exploit Mr Kakavas' known weakness, was permitted to proceed on the basis that it was not so clearly untenable that it could not possibly succeed.

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35 *Reynolds v Katoomba RSL All Services Club Ltd* [2001] NSWCA 234, (2001) 53 NSWLR 43.

36 *Foroughi v Star City Pty Ltd* [2007] FCA 1503, 163 FCR 131.

37 *Kakavas v Crown Ltd* [2007] VSC 526.

English authority

[61] *Calvert v William Hill Credit Ltd*[38] was the first occasion on which an English court considered the question whether a bookmaker can incur liability in negligence in respect of the gambling losses of a customer who is, or is known by the bookmaker to be, a problem gambler.

[62] The judgment commenced with two noteworthy observations:

> [2] ... Although the unrestrained continuation of gambling, whether profitable or loss-making, may cause or aggravate what is now a recognised psychiatric disorder, the harm for which compensation is mainly sought in the present case, namely the financial ruin caused by gambling losses, represents economic loss. It follows that the recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses involves a journey to the outermost reaches of the tort of negligence, to the realm of the truly exceptional.
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> [3] The question whether there existed a duty of care in the present case is further complicated by the fact that the relevant gambling losses were sustained during the period of gestation of a radical change in the attitude of the law towards gambling, which was itself the product of changing social attitudes ...

[63] Two variations of a duty of care were contended for, one broad and the other significantly narrower. The first was described by Briggs J in this way:

> [163] Undeterred by the generally discouraging thrust of the Australian gambling cases, Miss Day puts the claimant's case for the existence of a relevant duty of care in two ways, one broad and one much narrower. Taking the broad route first, she submitted that the common law should now recognise a duty of care on the part of a bookmaker to any customer appearing to be a problem gambler, first to take reasonable steps to offer assistance, including but not limited to a self-exclusion arrangement, and second to avoid unconsciously (by carelessness) exploiting the customer's vulnerability by permitting that customer to continue gambling.
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> [164] Miss Day submitted that this duty of care arose fairly and squarely from the recognition as a matter of public policy that the small defined class of problem gamblers needed special protection, as reflected in the March 2002 White Paper to which I have already referred, the licensing objectives in s 1 of the Gambling Act 2005, the November 2006 Code of Practice issued by the Gambling Commission, and the statements of Social Responsibility and Good Practice Code of the ABB and RGA, all of which were in existence by the material time.

[64] The narrower formulation of the duty of care focused upon the contents of a telephone conversation between the plaintiff and a team leader of the Board for the necessary assumption of responsibility. That telephone conversation had concluded with an assurance by the team leader that for the following six months the plaintiff would not be able to open an account or to bet over the telephone with the Board.

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38 *Calvert v William Hill Credit Ltd* [2008] EWHC 454 (Ch).

[65] The Judge was not attracted to the broader manifestation of the duty, noting as its essential features the identification of a duty of care to problem gamblers as a class and a legal obligation to take care in the application of every aspect of the Board's Social Responsibility Policy and Procedures in respect of any customer reasonably identifiable as falling within that class. Briggs J said:

> [168] I am not persuaded that by developing its own Social Responsibility Policy and Procedures William Hill can be said voluntarily to have assumed responsibility to all its problem gambler customers, in the sense of assuming responsibility to take care, with a concomitant liability to compensate customers injured in their mind or in their pocket by any failure to take care ...

[66] However the Judge considered that the facts disclosed a sufficient voluntary assumption of responsibility by the Board to exclude the plaintiff from telephone gambling with the company for six months so as to give rise to a duty to take care to implement that exclusion. The rationale for the difference in approach was explained in this way:

> [178] It may be asked why, if no voluntary assumption of responsibility to problem gamblers generally was incurred by William Hill by its adoption and promulgation of its Social Responsibility Policy and Procedures, should there be identified a voluntary assumption of responsibility merely because a problem gambler requests that the procedure be applied to him. In my judgment the request and the undertaking in response make all the difference. First, it brings the parties into a degree of relationship akin to that of contract, save only for the absence of consideration. Secondly, it deprives the objection that the provision of assistance may infringe the gambler's autonomy of any force, since he has himself specifically requested it. As I have already suggested, the very essence of self-exclusion is that a problem gambler, recognising in a moment of clarity that he is likely to succumb to his addiction in the future, seeks his bookmaker's assistance in helping him to control what he fears will be otherwise uncontrollable when temptation returns. He is, in effect, putting the bookmaker on notice of his fear that, at precisely the time when he wishes exclusion to be imposed upon him, he will himself be unable to control his gambling. Absent that fear, there would be no point in self-exclusion at all.

[67] However, even in respect of the narrower duty of care, the claim failed at the causation stage, Briggs J stating:

> [196] ... It would in my opinion fly in the face of common sense and be a travesty of justice if a problem gambler were able to attribute liability for his financial ruin to a particular bookmaker with whom he had made the relevant losses due to their failure to exclude him at his request, if he would, had he been excluded by that bookmaker, probably have ruined himself by betting with one or more of that bookmaker's competitors. The position would of course be otherwise if the problem gambler had sought to exclude himself from betting at any bookmakers by separate arrangements with each, since it would be no answer by one bookmaker to

> a claim for compensation for negligence to say that, but for his negligence, the gambler would have been harmed in the same way by the negligence of another.

[68] An appeal was dismissed in *Calvert v William Hill Credit Ltd*[39] where the primary focus of the appeal concerned the causation issue. No appeal was pursued against the rejection of the claim based on a broad duty of care.

A duty to protect others from a third party's actions

[69] Proceeding from the footing that in no decided case has a problem gambler ever succeeded in establishing negligence on the part of a betting organisation, Mr Gordon submitted that the plaintiff's case is "even more remarkable" in that she is not a problem gambler claiming loss but a person one step removed. I think that Mr Gordon seeks to take this argument too far when he portrays the plaintiff's claim as a journey beyond the outermost reaches of the tort of negligence[40] to "a tort galaxy far far away".

[70] Cases of self-harm are viewed by the law as a special category. As Lord Hoffmann said in *Reeves v Commissioner of Police of the Metropolis*:[41]

> ... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed ...

[71] The reasons why it is unusual for a duty to be recognised which involves safe guarding others from harm deliberately caused by third parties were explored by Tipping J (for the majority) in *Couch*:[42]

> [80] *The law has traditionally been cautious about imposing a duty of care* in cases of omission as opposed to commission; in cases where a public authority is performing a role for the benefit of the community as a whole and *in cases where it is the actions of a third party rather than those of the defendant that are the immediate cause of the loss or harm suffered by the plaintiff*. All three dimensions feature in the present case, but it is the third which is the most significant on the issue of proximity.
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> [81] Here the plaintiff seeks to hold a public authority liable for omissions which have allegedly enabled a third person to harm the plaintiff. It is the voluntary and independent conduct of the third person that has been the immediate cause of the loss or damage suffered by the plaintiff. The necessary causative link between the defendant's conduct and the harm suffered by the plaintiff is said to lie in the failure of the defendant to exercise an available power of control over the immediate wrongdoer or in a failure to warn of the risk the immediate wrongdoer posed. Discussion of

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39 *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427, [2008] 2 WLR 1065.
40 The characterisation of Briggs J at [61] above.
41 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL) at 368.
42 *Couch v Attorney-General*, above n 4.

the appropriate way to determine such cases can usefully begin with the general observation of Dixon J in *Smith v Leurs* that it is:

> ... exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature.

> [82] It is important for a proper understanding of Dixon J's frequently cited statement to appreciate that his reference to special relations was a reference to the relationship between the defendant (here the Department of Corrections and the probation officer) and the immediate wrongdoer (Bell). Whether that relationship is sufficiently special is conventionally assessed by reference to the concept of control. Did the defendant have sufficient power and ability to exercise the necessary control over the immediate wrongdoer? Unless that is so, it would be inappropriate to impose a duty of care on the defendant in favour of the plaintiff, fulfilment of which necessarily requires that power and ability. [Emphasis added.]

[72] Those observations of course apply to the relationship in the present case between the Board and Mr Monk.

The Board's control over Mr Monk

[73] The question as framed by Tipping J is whether the Board had sufficient power and ability to exercise the necessary control over Mr Monk.

[74] As noted in Mr Gordon's memorandum,[43] ss 309 and 310 of the Gambling Act were not effective to empower the Board to prohibit Mr Monk from all forms of betting. It was further submitted that it was simply wrong to seek to cast the legislative environment as one that was focused on preventing economic harm from problem gambling or indeed even preventing problem gambling itself. On the contrary the Board argued that the legislation has as its focus the key importance of sustaining and promoting racing and sports betting for the overall good of the racing industry and thus the economic benefit of the many people and organisations who derive their livelihoods from it.

[75] Parliament's recognition that gambling is an activity which has the potential for abuse in a small minority of cases was said to be reflected in the specific provisions comprising the statutory function in s 9(1)(f),[44] the problem gambling levy[45] and the Racing (Harm Prevention and Minimisation) Regulations.[46] With reference to the regulations it was submitted that they maintained the careful and restrained language which Parliament has used in the Racing Act when addressing the need to reduce and minimise the effects of problem gambling while at the same time still promoting racing and sports betting.

[76] Mr Gordon emphasised that there was no allegation in the claim that the Board had in any way failed to comply with its legal obligations under the Act

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43 At [37] above.
44 At [23] above.
45 At [25] above.
46 At [28] above.

or the Regulations. Rather, it was said, the plaintiff's allegation was expressed in a more amorphous way: that as a statutory/public body the Board was liable to the plaintiff in failing to protect her from the direct harm caused to her by Mr Monk.

[77] However, even acknowledging all those matters, the fact remains that the Board had the power to refuse to accept bets both under the Racing Act[47] and pursuant to its HP&M Policy which also provided for the exclusion of customers from the Board's outlets.[48] Indeed it exercised its powers in June 2011 in relation to Mr Monk.[49] There is also the disputed issue concerning the capability of the Board's CCTV facility.

[78] I do not consider that the defendant has established to the high standard required on a strike out application that the Board did not have a sufficient degree of power or control over Mr Monk so far as his gambling was concerned to justify a conclusion that the plaintiff's claim is untenable.

The relationship between the Board and the plaintiff

[79] After discussing in *Couch* the issue of a defendant's power to control a third party wrongdoer, Tipping J proceeded to consider the nature of the relationship equivalent to that between the Board and Ms Sinclair:

> [85] There is, however, another relationship which must be examined in cases of this kind. It is the relationship between the defendant (the Department and the probation officer) and the plaintiff (Ms Couch). That relationship must also be special in the sense that there is sufficient proximity between the parties to render it fair, just and reasonable, subject to matters of policy, to impose the duty of care in issue. The harm suffered by the plaintiff must of course have been foreseeable by the defendant. But that is not enough. As we will demonstrate, it is also necessary for proximity purposes to assess the nature of the risk which the immediate wrongdoer posed to the plaintiff. The more specific and obvious that risk is, the stronger will be the case for holding that the defendant (having sufficient power and ability to eliminate or at least reduce the risk) had a duty of care to the plaintiff, fulfilment of which required the reasonable exercise of that power and ability. There is a need for both qualifying relationships (control and proximity), not only in cases which require the defendant to control the immediate wrongdoer, but also in cases which require the defendant to give a warning to the plaintiff on account of control having failed or not been exercised or attempted.

[80] Tipping J then noted that in *Home Office v Dorset Yacht Co Ltd*[50] Lord Diplock drew a distinction for duty of care purposes between people who were at risk from the actions of the immediate wrongdoer simply because they were members of the public, to whom no duty was owed, and people who were the

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47 At [24] above.
48 At [39] above.
49 At [34] above.
50 *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL).

subject of a particular risk, different in its incidence from the risk faced by the general public, to whom a duty was owed. It was on this issue of particular risk that there was a division of view in *Couch*. The majority view is reflected in the following paragraph:

> [112] ... The general principle deriving from the cases is a sound and well-established one for determining proximity in cases where the harm suffered by the plaintiff is immediately caused neither by the defendant nor by a person for whom the defendant has vicarious liability. The probation officer and the Department did not owe Ms Couch any duty of care simply because she was a member of the public. To establish a duty of care Ms Couch must demonstrate that, either as an individual or as a member of an identifiable and sufficiently delineated class, she was or should have been known by the defendants to be the subject of a distinct and special risk of suffering harm of the kind she sustained at the hands of Bell. The necessary risk must be distinct in the sense of being clearly apparent, and special in the sense that the plaintiff's individual circumstances or her membership of the necessary class rendered her particularly vulnerable to suffering harm of the relevant kind from Bell.

[81] The minority judgment did not favour the requirement to identify a confined class:

> In this Court, Tipping J, while accepting that strike-out is premature, is of the view that a duty of care for harm caused through third party intervention could only be owed to a plaintiff who is either known by the defendant to be at special risk or is a member of an "identifiable and sufficiently delineated class" known to be at "special risk". It is not suggested that this is an approach of general application in considering liability in negligence in novel circumstances. Rather, it is suggested that it is a requirement in cases where loss is caused by the actions of a third party. Tipping J traces this requirement to the judgment of Lord Diplock in *Dorset Yacht*. We are of the view that the question of duty of care, in the case of third party intervention as in other cases, falls to be determined on the general approach followed since *Anns*, for reasons developed further below. But, in any event, we do not read Lord Diplock's judgment in *Dorset Yacht* to suggest a rule of general application that duties of care can be owed only to members of a confined group.

[82] It is common ground that Mr Monk was a customer of the Board. The Board also notes that the statement of claim is replete with assertions relating to the proximity, connection and relationship that existed as between the plaintiff and Mr Monk. No challenge is made by the Board to those assertions.

[83] However the Board emphasises that it is also common ground that at all material times the Board had no contact or dealings with, indeed no knowledge whatsoever of, the plaintiff, much less the financial arrangements that she chose to enter into with Mr Monk in the relevant one year period in 2010 and 2011.[51]

[84] The plaintiff was not a customer of the Board, nor was she otherwise involved in or connected with the Board's business. Indeed the first occasion on

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51 Above n 2.

which the Board learned of the plaintiff's existence was after her relationship with Mr Monk had come to an end and the Board was contacted by the "Fair Go" television programme. Consistent with that, there is no pleading of any actual or causal connection between the Board and the plaintiff. Adopting the approach of the majority in *Couch*, the Board submitted that it could not be under a duty to take care which was owed to the world at large.

[85] However the plaintiff sought to address the proximity requirement by pleading that she was a member of limited and defined class of people.[52] The Board took issue with that construct, contending that on proper analysis the duty alleged was owed to the whole world. In its written submissions it said:

> [51] ... the class of persons being asserted (ie "*middle aged, emotionally vulnerable, financially independent single women*") is demonstrably wrong, even on Ms Sinclair's own case. She knows well that Mr Monk carried out like schemes against men as well as women, and it is inconceivable she would contend that those men form a different class of claimant from her (based solely upon their sex). The very narrowest class that Ms Sinclair can contend for here is "*middle aged, emotionally vulnerable, financially independent people*". But in real terms, her claim alleges a duty of care owed by the Board to the whole world – ie to any person who might possibly meet and then fall victim to one of Mr Monk's schemes. This cannot even arguably form a basis for liability in negligence.

[86] In the face of that attack the plaintiff sought to move to higher ground in the form of the minority's view in *Couch*. Her written submission argued:

> [29] Although Todd in his commentary on *Couch* opines that the wider view taken by the President and Anderson J is " ... *open to the objection that it seems to contemplate a common law duty arising simply through the exercise or even existence of statutory powers*" and has been "*condemned in the House of Lords*", it is nonetheless entirely conceivable that the wider view argument may well be available in an appropriate case (including the present) to the plaintiff for the contended duty of care here, which again mitigates against strike out of the plaintiff's cause of action, irrespective of the more defined duty presently contended for by the plaintiff in recognition and application of the "*special and particular risk of harm*" category of victim, discussed in the judgment of the majority in *Couch* delivered by Tipping J, and pleaded in paragraph 82 of the statement of claim.

[87] Mr Monk was a fraudster of considerable ability. As the statement of claim recognises, his victims included his former employer and the TAB at the Wellington Hotel. He did not restrict his attentions to "unsuspecting female victims".[53] I am unable to accept that the description of the category of persons in the statement of claim, who are said to comprise a delineated class,[54] are an

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52 Statement of claim para 79 at [8] above.
53 Statement of claim para 80 at [8] above.
54 Statement of claim para 88 at [11] above.

identifiable and sufficiently delineated class who were or should have been known by the Board to be the subject of distinct and special risk of suffering loss at the hands of Mr Monk.

[88] Consequently I accept the Board's submission that on a correct analysis the claim in this case amounts to the proposition that the Board owed a duty of care to any person who might happen to meet Mr Monk and fall victim to one of his schemes. In essence, that amounts to an allegation of a duty of care owed to New Zealanders at large. On that issue I am bound by the reasoning of the majority in *Couch*. The Board cannot be held to owe to the plaintiff a duty of care if she is at no particular risk as compared with the public generally.

[89] However that is not the end of the matter so far as proximity is concerned. As Tipping J recognised in *Couch*, it is necessary to consider whether on the available material there is a reasonable possibility that the plaintiff might yet be able to formulate an arguable claim that she was at special risk of injury at the hands of Mr Monk.[55] The Court in *Couch* declined to strike out the claim because it considered that there was material that led to the view that the claim could be pleaded in a way that gave rise to an arguable case that Ms Couch was the subject of the necessary distinct and special risk of being harmed by Bell.[56] It was recognised that in the circumstances the Panmure Returned Services Association was a predictable target for a robbery by Bell and hence anyone who might be present in the premises at the time of such robbery would be at greater risk than members of the public generally.

[90] Is there such material in the present case? Ms Sinclair was not the spouse or partner of Mr Monk, nor was she a member of his family or whanau.[57] She was not a co-worker of Mr Monk.[58] Nor did Mr Monk have control over Ms Sinclair's property in the nature of being a trustee. The best case that can be advanced is that Ms Sinclair was a member of the alleged delineated class described in para 79 of the statement of claim.[59] However as noted above[60] I am unable to accept that such a group of persons is an identifiable and sufficiently delineated class. As the Board argued, the class could not fairly be confined to the female gender.[61] Nor do I consider that there is a sound basis for confining the "class" to those who are financially independent, assuming for the purposes of argument that that criterion is capable of objective definition.

[91] In my view on the material available it would not be possible to postulate a class of victim, of which the plaintiff was a member, which is sufficiently delineated from the public at large. On this aspect of the proximity argument, therefore, I find in favour of the Board. For this reason I would hold that the Board did not owe a duty of care to the plaintiff as alleged in the statement of claim.

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55 *Couch v Attorney-General*, above n 4 at [123].
56 At [124].
57 Refer para (b)(ii) in the definition of "harm" at [27] above.
58 Refer para (b)(iii) of the definition.
59 At [8] above.
60 At [87] above.
61 At [85] above.

Policy considerations

[92] With reference to the third stage of the duty of care analysis the joint judgment in *North Shore* said:

> [160] In a relatively small number of cases, at the final stage of the inquiry the court will find no duty of care exists notwithstanding that the loss was foreseeable and the relationship sufficiently proximate. It will do so because a factor or factors external to that relationship (perhaps indeterminate liability) would make it not fair, just and reasonable to impose the claimed duty of care on the defendant. At this last stage of the inquiry the court looks beyond the parties and assesses any wider effects of its decision on society and on the law generally. Issues such as the capacity of each party to insure against the liability, the likely behaviour of other potential defendants in reaction to the decision, and the consistency of imposition of liability with the legal system more generally may arise.

[93] It was under the heading "Policy factors" in the statement of claim that the legislative environment was outlined in significant detail. I have already addressed the statutory context to the claim in my discussion of proximity. Mention should be made, however, of the assertion in para 137 of the statement of claim that:

> There is no direct statutory exclusion of liability in either the Racing Act or the Gambling Act that is inconsistent with the Defendant's duty of care pleaded in paragraphs 86–89 above.

[94] With reference to that contention, the Board argued that, given the highly novel nature of the negligence claim, it would be hardly surprising that the legislature saw no need to expressly exclude the unarguable. Contending that the opposite argument was more persuasive, the Board submitted that if Parliament had intended to create civil liability on the part of the Board for any and all economic consequences resulting from problem gambling, it could easily have done so.

[95] The plaintiff countered that in advancing that submission the Board had "fallen into the trap" of the confusion described by Stephen Todd.[62] I do not consider that the absence of any references in the Racing Act to civil liability, one way or the other, assists in answering the present issue, whether or not it might be informative with reference to the issue of the recognition of a cause of action for breach of statutory duty.

[96] However there are two factors which I consider merit consideration in a policy context. As noted in *North Shore*, a policy concern of significance is whether to recognise a duty of care on these facts would be to contemplate the prospect of indeterminate liability. The Board could find itself in the position of indemnifier for all persons who saw fit to lend money to others who suffered from gambling problems and who used that money to bet on racing.

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62 Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington, 2013) at [6.6.02(5)].

[97] Secondly, in circumstances where the Board is already required to pay a gambling levy,[63] I question whether as a matter of policy the Board should be required in addition to expend funds on insurance against such a liability, assuming of course that suitable insurance cover would be able to be obtained.

[98] Consequently my view of the policy considerations fortifies my conclusion on the proximity inquiry. I consider that for both proximity and policy reasons a duty of care on the part of the Board of the nature alleged in this case should not be recognised.

Causation

[99] Had I rejected the Board's argument on the duty of care issue, I would have been reluctant to entertain a strike out application on the basis of causation alone. I share the views of Thomas J in *Sew Hoy & Sons Ltd v Coopers & Lybrand*:[64]

> Questions of causation are probably particularly unsuitable for consideration on the basis of the pleading alone. As stated by Sir Anthony Mason CJ in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, at p 515; The common law tradition is that what was the cause of a particular occurrence is a question of fact which "must be determined by applying common sense to the facts of each particular case", in the words of Lord Reid: *Stapley [v Gypsum Mines Ltd* [1953] AC 663 at p 681]. A full grasp of the facts is imperative. Experience has demonstrated time and again that the answer to the question of whether there is a nexus between the breach of the defendant and the loss suffered by the plaintiff and, if so, what it is, then tends to fall into place. Indeed, if the question whether there is a causal connection between the wrong-doing and the damage is to be resolved by the application of common sense, it is difficult to see how that question properly can be approached in advance of the evidence. Common sense thrives on hard facts, not abstractions.
>
> This is not to say that a claim should not be struck out if it is clearly untenable on the pleadings and the question of law is one which can stand in isolation from the facts giving rise to it. In such circumstances it has always been accepted that the issue should be determined and the litigants spared the cost and inconvenience of a full trial.

[100] Indeed, as noted in *Fleming v Securities Commission*,[65] it might be viewed as intellectually dishonest to decline to entertain the issue if it can safely be determined at this stage.

[101] Under the heading "Causation" the statement of claim states at para 91:

> [91] In the circumstances, the risk of LM committing further criminal acts of fraud to obtain funds to fuel his problem gambling addiction was reasonably foreseeable by the Defendant in light of the following:
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> 91.1 The Defendant's knowledge of LM's criminal conviction in 1988 for theft as a servant from his then employer, the Nurseryman's Association, and of LM having defrauded the TAB located at the

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63 At [25] above.
64 *Sew Hoy & Sons Ltd v Coopers & Lybrand* [1996] 1 NZLR 392 (CA) at 407.
65 *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 520.

> Wellington Hotel out of a significant sum of money whilst he was on parole for the fraud against his former employer; and
>
> 91.2 The nature and level of available control of LM's betting activities.

[102] The Board was critical of this paragraph, submitting that, while it prima facie goes to causation, in fact it does not address that issue but instead repeats matters going to the foreseeability of harm. The Board argues that the economic harm complained of was not caused by Mr Monk gambling at the TAB but rather because, seemingly against her better judgement, the plaintiff chose to advance loans to Mr Monk which he did not then repay.[66] As the Board's written submission said:

> [70] ... At its heart, Ms Sinclair's complaint is not that Mr Monk gambled. Her complaint is that he did not repay (most of) the loans she advanced to him. The proof of this is in the pudding. Mr Monk could have wagered many times more than the $141,800 he borrowed from Ms Sinclair, but without ever causing her any economic harm at all – so long as he repaid the loans she had made to him. Repayment to Ms Sinclair could have come from the profits of the gambling activity, from his own earnings, or indeed from any other source whatsoever. It wasn't a gambler's gambling that caused the economic loss complained of here rather it was a debtor's failure to repay a loan in full. It is trite but the risk of non-payment is an inherent risk every single time money is loaned from one person to another (and especially when lent on an unsecured basis). Self-evidently, what a debtor may spend borrowed money on does not dictate whether or not they will later repay the loan.

[103] The plaintiff rejects that submission, reiterating that it is the fundamental basis of her claim that, but for the Board failing to completely ban Mr Monk from all betting earlier than it did in June 2011 (and only after the Board's public exposure in a "Fair Go" programme), the "so called loans" would in all likelihood not have been made.

[104] In *Fleming* Cooke P discussed three cases of high authority which in his view showed that there may be found to have been a *novus actus interveniens*, breaking the chain of causation in the eyes of the law, if a plaintiff has foreseeably taken a risk which it was not reasonable to take at the cost of a previously negligent defendant. Inevitably, as Cooke P said, it is a question of fact and degree. *Fleming* is one of the cases cited by Stephen Todd for the proposition that a plaintiff's conduct may sometimes be of such importance as to be regarded as the "real cause" of the damage.[67]

[105] In my view the present case is properly analysed in that way. I accept the tenor of the Board's submission above. I consider that the real cause of the plaintiff's losses was her decision on numerous occasions to advance a considerable sum of money to Mr Monk on an unsecured basis. Her real complaint is not that Mr Monk was not prevented from gambling by the Board but that Mr Monk did not repay the funds which she advanced to him.

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66 In fact it is stated in para 19 of the statement of claim that from 3 August 2010 to 18 January 2011 Mr Monk repaid $1,225 to the plaintiff.

67 At [20.3(4)].

Disposition

[106] Because I consider that the plaintiff's case is not reasonably arguable either on the issue of the existence of a duty of care as pleaded or on the matter of causation, I grant the Board's application for an order striking out the claim.

[107] The Board is prima facie entitled to costs and reasonable disbursements which, on my preliminary view, would be on a 2B basis. If the parties are unable to agree on costs, the Board is to file a costs memorandum by 18 September 2015 and the plaintiff is to file a response by 9 October 2015.

Application to strike out Ms Sinclair's claim granted.

Solicitors for the plaintiff: *MinterEllisonRuddWatts* (Wellington).
Solicitors for the defendant: *McVeagh Fleming* (Auckland).

Reported by: Rachel Marr, *Barrister*