

# Gambling Disorder, Financial Loss and Suicide—A Journey to the ‘Outer Reaches’ of the Common Law

Janet O’Sullivan\*

**Abstract** Almost as soon as Briggs J opined in *Calvert v William Hill Credit Ltd* (2008) that ‘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’, the legal and technological context of his dictum utterly transformed. The liberalising regime of the Gambling Act 2005 was not in force when the facts of *Calvert* occurred, and the legislation was itself out of date by the time it was implemented, with the arrival of highly addictive online gambling platforms, smartphones, sophisticated targeted marketing and ubiquitous advertising. Today, gambling disorder is a growing, devastating psychiatric disorder and a major public health problem, with far too many sufferers taking their own lives as a result, while gambling operators commit egregious breaches of licensing conditions and codes of practice intended to protect vulnerable customers. This article considers how the common law should respond, concluding that gambling disorder should no longer languish at the ‘outermost reaches’ of the tort of negligence.

**Key words:** duty of care; gambling disorder; negligence; suicide; tort

## 1. Introduction

At a time of economic gloom, it is heartening to reflect that Great Britain is a world leader in something—gambling. Today gambling is a mainstream leisure entertainment, with inescapable advertising, sports sponsorship, honours for its chief executives,<sup>1</sup> vast profits for its

\* Professor of Private Law, University of Cambridge, Cambridge, UK. E-mail: [jao21@cam.ac.uk](mailto:jao21@cam.ac.uk). I am grateful to Jonathan Saunders for his assistance with research for the article, and to my colleagues (past and present) in the Cambridge Faculty of Law with whom I have discussed this issue; all errors and infelicities that remain are of course my own. I would like to dedicate this article to the memory of those who lost their lives as a result of gambling disorder.

<sup>1</sup> For example, Denise Coates, founder and joint-CEO of Bet365, was awarded a CBE in the New Year’s Honours List 2012.

shareholders.<sup>2</sup> The Office of Budget Responsibility estimates that for 2022–2023, taxation from gambling will raise £3.3 billion.<sup>3</sup>

But this apparent success story hides a tragic reality. The House of Lords Select Committee on Gambling Harms<sup>4</sup> cited academic research, collated by the charity 'Gambling with Lives', suggesting that the number of gambling-related suicides per year is in the range of 250–650,<sup>5</sup> concluding that on average one sufferer from pathological gambling addiction, or 'gambling disorder' commits suicide every day.<sup>6</sup> A recent study in Sweden found that men and women with a gambling disorder were 15 times more likely to commit suicide, compared to the general population, rising to 19 times more likely in men between the ages of 20–49.<sup>7</sup>

Gambling disorder is a recognised, serious psychiatric illness.<sup>8</sup> Sufferers all too frequently take their own lives; for many others, their lives and those around them, are blighted by this addiction. The message from the gambling industry is to describe sufferers as 'problem gamblers',<sup>9</sup> implying that they are weak individuals who have no one to blame but themselves, for not gambling 'responsibly'. In stark contrast, the HL Select Committee Report begins with a warning that 'the unscrupulous methods and ingenuity of some gambling operators make for shocking reading... We have heard appalling stories of the most vulnerable people being targeted with inducements to continue gambling when the companies know they cannot afford to. Sometimes this is through failure to

<sup>2</sup> For example, pre-tax profits for William Hill's parent company, 888 Holdings, in the 2022 financial year exceeded £217.9m (figures reported in *Sky News* report by Sarah Taaffe-Maguire, 14th April 2023).

<sup>3</sup> <<https://obr.uk/forecasts-in-depth/tax-by-tax-spend-by-spend/betting-gaming-du-ties/>>. Date accessed April 2023.

<sup>4</sup> House of Lords Select Committee, *Social and Economic Impact of the Gambling Industry Gambling Harm—Time for Action* Report of Session 2019–21, published 2 July 2020 (HL Paper 79) ('HL Select Committee Report').

<sup>5</sup> Ibid [298], noting also that the Government has no official figures or even estimates of the number of gambling-related suicides each year in the UK.

<sup>6</sup> Ibid, Summary.

<sup>7</sup> Anders Håkansson and Anna Karlsson, 'Suicide Attempt in Patients With Gambling Disorder—Associations With Comorbidity Including Substance Use Disorders' *Frontiers in Psychiatry*, 16th November 2020.

<sup>8</sup> See <<https://www.rcpsych.ac.uk/mental-health/problems-disorders/gambling-disorder>> Date accessed April 2023. It is recognised in the US Diagnostic and Statistical Manual of Mental Disorders, and the World Health Organisation ICD Classification of Mental and Behavioural Disorders.

<sup>9</sup> Language used, for example, by the gaming industry's body, the Betting and Gaming Council, throughout its publications and website, when discussing gambling-related harms.

carry out the most basic checks, sometimes it is even deliberate'.<sup>10</sup> The question which this article seeks to address is, where is the common law in all of this?

For lawyers across the common law world, this unique judge-made body of law is a source of pride. As Lord Wilson said recently in a very different context, the common law was 'built by the judges on behalf of the people over seven centuries. It has been generated from below, not imposed from above'.<sup>11</sup> Traditionally it has had an important role in responding to new social harms by innovating new forms of civil liability. In the 19th century it responded, post-industrial revolution, to the horrific injuries suffered by factory workers by inventing the tort of breach of statutory duty;<sup>12</sup> at the turn of the 20th century it was radical in its recognition of the possibility of liability for what we now call post-traumatic stress disorder (PTSD) and other physical and psychological harms resulting from traumatic shock.<sup>13</sup> We can see similar social protection innovated by the Chancery courts, who in the 19th century created a jurisdiction to give relief against unconscionable bargains, to protect penniless young heirs who had been tempted to trade their future inheritance at a huge undervalue for cash, often in order to gamble.<sup>14</sup> So why does the common law seemingly have no role in protection against harms caused by gambling disorder? To answer that we need to turn to an influential, but restrictive, decision from 15 years ago: *Calvert v William Hill Credit Ltd*.<sup>15</sup>

## 2. *Calvert*—The 'Outermost Reaches of the Tort of Negligence'

In *Calvert* the trial judge, Briggs J said something very striking, that 'recognition of a common law duty to protect a problem gambler from self-inflicted gambling losses involves a journey to the outermost reaches

<sup>10</sup> HL Select Committee Report (n 4), Summary.

<sup>11</sup> *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, [2021] AC 1014, [45].

<sup>12</sup> *Groves v Lord Wimborne* [1898] 2 QB 402 (CA), an innovation that allowed the court to evade the troublesome defence of 'common employment' (that disallowed actions in negligence against the defendant employer where they were being sued by virtue of the actions of a 'fellow-servant of the plaintiff').

<sup>13</sup> *Dulieu v White & Sons* [1901] 2 KB 669 (KBD).

<sup>14</sup> See, for example, *Earl of Chesterfield v Janssen* (1750) 1 Atkyns 301, 26 ER 191 (Court of Chancery), discussed Julius Grower 'Constructive Fraud in the Time of Hardwick and Thurlow' forthcoming in David Foster and Charles Mitchell (eds), *Essays on the History of Equity* (Hart Publishing 2023).

<sup>15</sup> [2008] EWHC 454 (Ch), [2008] LLR 583, Briggs J; on appeal [2008] EWCA Civ 1427, [2009] Ch 330, judgment of the court given by Sir Anthony May.

of the tort of negligence, to the realm of the truly exceptional'.<sup>16</sup> This dictum was quoted with approval by the Court of Appeal and it is what prompted this article. Why did the facts of *Calvert* sit in the 'outermost reaches' of the tort of negligence and is that conclusion still appropriate? Why were they regarded as 'truly exceptional' and, again, is that conclusion appropriate today?

Graham Calvert was a greyhound trainer and heavy gambler. After many years of betting in various different bookmakers, in May 2006 Calvert started telephone betting with William Hill ('WH'). As the Court of Appeal said, 'In periods of calmer lucidity, he was aware that his gambling was at times uncontrolled and potentially destructive'.<sup>17</sup> After one particularly destructive betting frenzy in early June, he phoned WH and asked to be self-excluded from telephone betting (WH offered a 6-month self-exclusion scheme, pursuant to its 'social responsibility code'). The relevant senior employee agreed to do so, but then totally failed to implement the self-exclusion procedure. Soon afterwards, Calvert resumed telephone betting with WH—in the next 6 months he racked up losses amounting to over £1.9m (because he had had to resort to expensive borrowing to fund his extraordinary levels of gambling). So he sued WH for damages in negligence.

Though this was mainly a claim for financial loss, the trial judge accepted that, during this period, C's gambling disorder worsened—'the claimant had lost control of his gambling by the last quarter of 2006'.<sup>18</sup> So he allowed an amendment to the claimant's pleadings to add 'a claim for damages for personal injury constituted by the deterioration of his gambling disorder'<sup>19</sup> caused by the defendant's breach.

Calvert pleaded his case on duty of care in two ways—a broad version and a narrow version. The broad version was expressed as follows:

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.<sup>20</sup>

<sup>16</sup> [2008] EWHC 454 (Ch) [2].

<sup>17</sup> [2008] EWCA Civ 1427 [1].

<sup>18</sup> [2008] EWHC 454 (Ch) [134].

<sup>19</sup> [2008] EWHC 454 (Ch) [116].

<sup>20</sup> [2008] EWHC 454 (Ch) [163].

This broad version was rejected by Briggs J, and regrettably there was no appeal on that point to the Court of Appeal. I will come back to this and the judge's reasoning, because it is central to the position I will adopt in this article. Developments in the last 15 years—both in the law and in the gambling market—lead me to think that a broad duty of care is now both appropriate and should not be particularly controversial. For now, it is important to conclude the discussion of the decision in *Calvert*.

The judge accepted the claimant's narrow formulation of a common law duty of care, derived from WH's employee's specific assumption of responsibility to him in agreeing to put the self-exclusion in place; WH's employee then failed to do so, which Briggs J held amounted to a breach of that narrow common law duty of care, allowing the claimant to continue gambling. Nonetheless, Calvert's claim was unsuccessful. This is because the judge was convinced that, if WH had excluded him, Calvert would simply have gambled and lost equivalent sums elsewhere. For Briggs J, this meant there was no causation between WH's employee's breach and Calvert's loss: 'the claimant would ultimately have ruined himself financially, albeit at a slower rate ... [concluding] that he would have ruined himself by the end of 2007'.<sup>21</sup> The Court of Appeal agreed with this conclusion, though adopted slightly different reasoning to explain it.<sup>22</sup>

As that dictum from Briggs J shows, although the amendment to the pleading regarding Calvert's psychiatric harm was allowed, the case was treated essentially as a pure financial loss claim—the personal injury claim, the deterioration of Calvert's gambling disorder by the defendant's breach, was lost in the mix.<sup>23</sup> Of course this did not ultimately matter, because the claim failed entirely, but it will assume significance in any future challenge to *Calvert*. Such a challenge seems likely since, 15 years on, its reasoning is no longer convincing, the result no longer appropriate. In short, *Calvert* is now both legally and technologically out of date.

<sup>21</sup> [2008] EWHC 454 (Ch) [203].

<sup>22</sup> The Court of Appeal regarded the issue as going to the 'scope' of WH's duty of care, concluding that the scope of the duty of care assumed by WH was not to prevent the claimant from gambling or to enable him to gamble free from all risks, merely to prevent him placing bets with them.

<sup>23</sup> Ironically, the severity of Calvert's gambling addiction seems integral to the court's reasoning that defeated his claim, i.e. that if he had been properly excluded by WH he would not have been able to resist gambling with other operators.

### 3. *Calvert—The Timing Dimension*

#### A. *Legally Out of Date*

The assumptions that drove the ‘outermost reaches’ dictum have been undermined by at least two legal developments since the decision in *Calvert*.

First, in the last few years the UK Supreme Court<sup>24</sup> has re-emphasised the central importance of a basic, binary distinction in the law of negligence, previously labelled as the difference between acts and pure omissions, now expressed as the difference ‘between causing harm (making things worse) and failing to confer a benefit (not making things better)’.<sup>25</sup> The former is much more readily covered by law of negligence, a duty of care is the default setting; in contrast the latter only exceptionally gives rise to a duty of care. As a simple illustration, this is the difference between driving into someone, versus watching a stranger step in front of car and not shouting a warning. Failing to confer a benefit is only actionable in exceptional circumstances, one of which is if the defendant assumed responsibility for the claimant,<sup>26</sup> and this was the judge’s focus in *Calvert*.<sup>27</sup>

As simple as this distinction sounds, it can be extremely difficult to draw in practice.<sup>28</sup> The particular facts of *Calvert* are probably correctly analysed as involving merely a failure to benefit or protect the claimant. WH omitted to help, it failed to stop Calvert from gambling, as a

<sup>24</sup> In particular in *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736; *GN v Poole BC* [2019] UKSC 25, [2020] AC 780. These decisions re-emphasised this issue as central to the reasoning in earlier House of Lords cases such as *Stovin v Wise* [1996] AC 923 (HL).

<sup>25</sup> *GN v Poole BC* [2019] UKSC 25, at [28] per Lord Reed.

<sup>26</sup> Stelios Tofaris and Sandy Steel, ‘Police Liability in Negligence for Failure to Prevent Crime: Time to Rethink’ (2016) 75 CLJ 128 set out the exceptions as follows, ‘A is not under a duty to take care to prevent harm occurring to B through a source of danger not created by A unless either (i) A has assumed a responsibility to protect B from that danger, (ii) A has a special level of control over that source of the danger, or (iii) A’s status creates an obligation to protect B from that danger’. This paragraph (at the time not yet published) was expressly approved in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 by Lord Kerr at [176] and by Lady Hale at [189], both in dissent.

<sup>27</sup> The judge’s ‘outermost reaches’ comment reflects the framing of the facts as *doubly* exceptional—failure to protect someone from causing himself *pure financial loss*, a form of loss for which the default setting is also ‘no liability’ in the absence of an assumption of responsibility, in this context under the line of authority derived from *Hedley Byrne & Co v Heller and Partners* [1964] AC 465.

<sup>28</sup> See, for example, the difference of opinion in *Mitchell v Glasgow City Council* [2009] UKHL 11, [2009] 1 AC 874 between Lord Hope, and Lord Rodger and Lady Hale.

result of which failure he lost money and his gambling disorder worsened, which was his pre-breach trajectory if he had not asked to self-exclude.<sup>29</sup> But, as we will see, in today's environment there are many other potential breaches by gambling operators that actively cause harm, that worsen the position of the gambler relative to their pre-breach position, exacerbating addiction and, tragically in some cases, leading to suicide. On the orthodox approach of the Supreme Court, those sorts of cases should have a duty of care as the default setting, and a defendant should be having to argue, very exceptionally, for immunity from negligence liability.<sup>30</sup>

It is worth asking at this point whether it matters that gambling disorder is a psychiatric condition. It is true that traditionally the common law did not allow recovery for psychiatric harm unless it was consequent on physical injury;<sup>31</sup> however, today this restrictive attitude remains only in relation to so-called 'secondary' or 'relational' victims of psychiatric harm.<sup>32</sup> For 'primary victim' claimants who suffer pure psychiatric harm as a result of trauma or fear for their own safety, their claims are now subject to the same rules as victims of physical injury.<sup>33</sup> The same applies to psychiatric harm triggered by other mechanisms, such as (most relevantly for this article) psychiatric illness resulting from extreme workplace stress, where the defendant employer knew of some particular problem or vulnerability in the claimant, but did not take reasonable steps to reduce the stress.<sup>34</sup> Overall, I think it is legitimate to assume that gambling disorder would fall into the same 'default setting'.

*Calvert* is out of date because of a second, much more centrally relevant, legal development—the Gambling Act 2005. The facts of *Calvert* occurred in 2006, in the liminal space between the Act being given royal

<sup>29</sup> Even in 'failure to protect' cases with a 'no duty' default, sometimes a duty of care is recognised, on one of the usual exceptions such as assumption of responsibility, or control over the claimant or a culpable third party. In our context, the most significant are custodial cases, such as *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL), where the police were held liable for failing to prevent an already suicidal person, otherwise of sound mind, from committing suicide in police custody.

<sup>30</sup> Such an outcome is extremely rare in a personal injury context. One exceptional example is *Mulcahy v Ministry of Defence* [1996] QB 732 (CA), where the Court of Appeal held that no duty of care is owed by one soldier to another in battle conditions.

<sup>31</sup> *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 222 (PC).

<sup>32</sup> See, for example, *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL); *Paul v Royal Wolverhampton NHS Trust* [2022] EWCA 12, [2023] QB 149, on appeal to the Supreme Court at the time this article went to press.

<sup>33</sup> *Page v Smith* [1996] AC 155 (HL).

<sup>34</sup> Discussed text to ns 83–85.

assent in 2005 and its coming into force in 2007. *Calvert* was out of date by the time it was decided. On the particular facts of the case, this is important. If a gambler wishes to self-exclude today, they can seek self-exclusion via compulsory schemes which including all licensed operators. In particular, to self-exclude from online sites they would use 'GAMSTOP' which prevents someone registered from using gambling websites and apps run by companies licensed in Great Britain, for a period of their choosing. For land-based and telephone gambling, they would contact the 'MOSES' helpline (Multi Operator Self Exclusion Scheme), which allows someone to self-exclude from multiple bookmakers. So a gambler such as *Calvert* would not now need to make a self-exclusion agreement with an individual gambling operator, but merely register with one of the compulsory schemes. Since all licensed operators are part of these compulsory schemes, the argument that prevailed in *Calvert* to defeat the claim (that if WH had not breached its narrow duty of care but had properly excluded the claimant, he would inevitably have gambled elsewhere) would have no traction today.

More generally, the Gambling Act transformed gambling in the UK, into the largest regulated market in the world.<sup>35</sup> Previously subject to tight legal restriction (gambling debts were unenforceable, bookies required to have blacked-out windows), gambling became a mainstream, lucrative leisure industry. The Gambling Commission is the regulator and licensing body, presiding over a detailed regulatory regime, one that is meant to ensure social responsibility.

### B. *Technologically Out of Date*

There is another timing irony. The drafters of the Gambling Act had worried about super-casinos and banning slot machines in taxi offices and chip shops, but just as the Act came into force, the first iPhone was launched in the UK in 2007. The smartphone made *Calvert's* telephone betting and the Act's scheme for licensing casinos seem antediluvian. As writer and journalist Rob Davies has noted, 'The government had attempted to regulate internet gambling without knowing that, within the space of a few years, access to an online casino would be in every pocket'.<sup>36</sup> The Gambling Act was, as many have pointed out, an analogue solution to a digital problem.

<sup>35</sup> The Gambling Act regime is more permissive than many other common law jurisdictions. For example online gambling remains illegal in the majority of US states, likewise land-based casinos.

<sup>36</sup> Rob Davies, *Jackpot: How Gambling Conquered Britain* (Guardian Faber 2022) 43.

#### 4. *The Brave New Digital World*

This ‘digital problem’ would have been unimaginable even to the parties in the *Calvert* litigation 15 years ago. The innovations of the digital age have brought an inexhaustible supply of new products, including Fixed Odds Betting Terminals (FOBTs) in bookmakers, online casino games and instant in-play betting on sporting events. Unlike naturally occurring products such as nicotine and narcotics, these products are designed and modified to encourage punters to bet more money, more frequently,<sup>37</sup> in other words, to encourage addiction. Using cleverly refined techniques as to the speed and design of play, visual tricks and accompanying graphics and music, they exploit the heuristics and errors in normal human behavioural psychology. Natasha Schüll in her groundbreaking book about machine gambling in Las Vegas casinos<sup>38</sup> described those machines as ‘addictive by design’, showing how data gathered from the casino floor is used to adjust pay-out schedules in order to maximise playing time. This data from casinos—vast human laboratories—about how best to manipulate human behaviour is then translated into online and gaming machine product development.

These highly addictive products are then promoted by overwhelming advertising,<sup>39</sup> and robust studies have traced a link between advertising and more frequent and riskier gambling. Banks and Waters, criminologists who explored the gambling industry through the lens of state-corporate harm, wrote that ‘the consumption cues which promote gambling as a glitzy and glamorous transformative experience that results in economic and social riches have serious repercussions for how individuals understand wagering activities. In turn, such understandings can shape individuals’ gambling behaviour and increase their susceptibility to the numerous harms posed by gambling.’<sup>40</sup> And there is something new—aggressive personalised targeting of individuals, with emails, tweets, social media messaging. Gambling companies have access to vast amounts of real-time data about customers and their

<sup>37</sup> <<https://www.theguardian.com/technology/2018/apr/30/bookies-using-ai-to-keep-gamblers-hooked-insiders-say>> Date accessed April 2023.

<sup>38</sup> Natasha Dow Schüll, *Addiction by Design: Machine Gambling in Las Vegas* (Princeton University Press 2014).

<sup>39</sup> The HL Select Committee Report (n 4) states that ‘the gambling industry currently spends in excess of £1.5 billion a year on advertising’, [479].

<sup>40</sup> James Banks and Jaime Waters, ‘The Gambling Act 2005 and the (De)regulation of Commercial Gambling in Britain: A State-Corporate Harm’ (2022) Sociological Research Online 1–19.

transactions, and use data profiling software to monitor customers. A report by PwC identified approximately 200 markers of harm that gambling operators can see in their transaction data,<sup>41</sup> while a research project commissioned by the charity Clean Up Gambling, carried out by the independent research institute Cracked Labs,<sup>42</sup> identified that an operator had access to 186 individual pieces of information on an individual gambler.<sup>43</sup> Where the software detects that a frequent gambler has gone offline for a while, artificial intelligence can use this information to determine their level of addiction and see if they are someone to try and 'win back',<sup>44</sup> by targeting with so-called free bets or other inducements.

Dostoevsky's novella *The Gambler*, published in 1866, describes being in the grip of overwhelming gambling addiction, and he was not subjected to today's targeted strategies and high-speed, highly addictive products. Anthropologist Rebecca Cassidy, in her book *Vicious Games*, quotes an employee at the head office of a bookmaker talking gleefully about FOBTs, 'Honestly most people try them and that's it. Hooked!'<sup>45</sup>

Some of the really egregious behaviour comes from so-called VIP schemes. These involve an employee of the gambling company, working on commission, making personal contact with a customer as their personal account manager, sending gifts and inviting them to sporting events, at all times enticing more gambling with free bets and other incentives, including loyalty rewards programme (so the more they spend the more free bets they get). These schemes focus on players who are staking and losing large sums—you are soon ditched from the scheme if you are making money. One company reported that 2% of its customers were VIPs, but they accounted for 83% of its profits.<sup>46</sup> Lydia

<sup>41</sup> PwC report, *Remote Gambling Research: Interim report on Phase I* April 2016, for the Responsible Gambling Trust.

<sup>42</sup> 'Digital Profiling in the Online Gambling Industry. A report by Cracked Labs' commissioned and published by Clean Up Gambling, January 2022.

<sup>43</sup> The executive summary states, 'Those 186 attributes painted a detailed and personal portrait of the individual's gambling behaviour, including their propensity to gamble, their favourite games, and their susceptibility to marketing. The profiles also included metrics as to how much they are worth financially to the gambling companies and categorised individuals on their inferred "value" to operators. Additionally, the investigation found that these data profiles were able to determine whether individuals have self-excluded from gambling or not'.

<sup>44</sup> See for example Adam Satariano, 'What a Gambling App Knows About You', NYTimes.com, 24 March 2021.

<sup>45</sup> Rebecca Cassidy, *Vicious Games: Capitalism and Gambling* (Pluto Press 2020) 82.

<sup>46</sup> Gambling Commission report, discussed Guardian 3rd January 2020 <<https://www.theguardian.com/society/2020/jan/02/gambling-report-shows-industrys-reliance-on-loss-making-customers>> Date accessed April 2023.

Thomas, an investigative journalist for BBC Radio 4's *File on Four*, told the House of Lords Select Committee that 'The Gambling Commission requires companies to check a player's income before they are made a VIP, but in my experience this check isn't done. Because no check is done the gambling companies have no idea whether a player is a high roller who can afford huge losses, or someone who cannot afford it. Customers I have spoken to say they feel "groomed" to spend more by the gambling company'.<sup>47</sup> These schemes have in the past been responsible for some serious breaches of the Gambling Commission's codes of practice and licensing rules, triggering significant fines.

It is now recognised by all political parties that, in the modern digital world, the Gambling Act regulatory regime is inadequate, and, in December 2020 the government called for it to be reviewed.<sup>48</sup> The subsequent White Paper proposing reform was been repeatedly delayed, because of COVID, but also by changes in Prime Ministers and at the Department for Culture, Media and Sport, and was finally released just as this article was going to press.<sup>49</sup> The White Paper contains a number of proposals<sup>50</sup> to tighten the regulatory regime for online gambling operators, with a view to reducing instances of gambling disorder and gambling harms. These include, inter alia, more prescriptive rules on when online operators must check customers' financial circumstances for signs their losses are harmful, a stake limit for online slots games, making online games safer by design by reviewing game speeds and removing features which exacerbate risks, and introducing a statutory levy paid by operators in scope directly to the Gambling Commission to fund research, education and treatment of gambling harms.

For the purposes of this article, however, there is one striking omission. The HL Select Committee Report had proposed amending the Gambling Act, to provide expressly for civil actionability for breach of the licence conditions and social responsibility codes of practice made by the Gambling Commission, opining that 'the issues as to the existence and scope of a tortious duty of care that were considered in *Calvert* may be most satisfactorily addressed by the creation of an action for breach

<sup>47</sup> HL Select Committee Report (n 4), [347].

<sup>48</sup> 8th December 2020 <<https://www.gov.uk/government/news/government-launch-review-to-ensure-gambling-laws-are-fit-for-digital-age>> Date accessed April 2023.

<sup>49</sup> Policy paper *High Stakes: Gambling Reform for the Digital Age*, CP 835, presented to Parliament by the Rt Hon Lucy Frazer KC MP, Secretary of State for Culture, Media and Sport, on 27 April 2023 ('White Paper').

<sup>50</sup> Proposals which will require further, lengthy periods of consultation.

of statutory duty'.<sup>51</sup> An action for breach of statutory duty (a separate tort from the tort of negligence) would have meant that a contravention of those licence conditions and codes of practice 'would not only lead to the sanctions which the Gambling Commission can impose, but would also give rise to an action for breach of statutory duty at the suit of a customer who can prove that he has suffered loss as a result'.<sup>52</sup>

Alas, this proposal has not been reproduced in the White Paper, it has been quietly dropped. Instead, the White Paper proposes the creation of a gambling ombudsman:

...that is fully operationally independent and is credible with customers. The body will adjudicate complaints relating to social responsibility or gambling harm where an operator is not able to resolve these. The information that an ombudsman collates through complaints will assist the Gambling Commission in planning its enforcement activity and help industry to improve processes and support vulnerable consumers.<sup>53</sup>

Although this proposal is welcome and will undoubtedly help customers achieve some forms of redress, it is not a substitute for civil liability. An ombudsman will not be able to award full compensation in the tort sense, 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.<sup>54</sup> In particular, an ombudsman will be focusing on financial loss, they will not be in a position to provide redress for the exacerbation of a psychiatric illness such as gambling disorder, nor compensation under the Fatal Accidents 1976 for the dependents of someone who took their own life.

With the disappearance of the breach of statutory duty tort proposal, the only route to full civil redress is to reconsider *Calvert* and rehabilitate the common law of negligence in the gambling context. Before exploring that prospect in detail, a brief aside.

### 5. *An Aside*

As the White Paper acknowledges, gambling is now a major public health issue. Before we return to the law, it is worth pausing to consider how the debate about gambling is framed. For gambling companies,

<sup>51</sup> HL Select Committee Report (n 4), [386].

<sup>52</sup> *Ibid*, [387].

<sup>53</sup> White Paper Executive Summary, section headed 'Dispute resolution and consumer redress'.

<sup>54</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL Sc) 39 (Lord Blackburn).

theirs is a legitimate market-driven leisure industry, enjoyed by many people, one which benefits from *laissez-faire* and ‘light touch self-regulation’, antithetical to intervention from the ‘nanny state’. This views gambling as morally neutral and is seen in the labelling of ‘problem gamblers’—a small number of weak individuals are the problem, it was their choice to start gambling and their fault they became addicted—as long as we push a responsible gambling message, they are not our problem. This closely reflects the historical approach of tobacco manufacturers in resisting responsibility for the harm caused by their products<sup>55</sup> and, more recently, of the manufacturers of oxycontin.<sup>56</sup> For Cassidy, ‘freedom to choose became sovereign, and attempts to limit the exposure of people to harmful products could be presented as an arrogant and patronising act of contempt’.<sup>57</sup> This seems to be part of the narrative that supports the ‘outermost reaches’ dictum, to *suppress* examination of the industry against the norms of private law, individual rights and duties.

But for a common lawyer, this debate is not precisely on point. Whether a particular industry or activity is heavily regulated by the state, or whether it has an individualist, *laissez-faire* philosophy, does not affect the remit and role of the common law. After all, individualism pre-supposes individuals, some of whom suffer serious harm from the business model of gambling operators—the player, also their partners and families, friends and employers. Just because the gambling industry has moved from human interactions with physical customers in the real world, to an online model of anonymous account holders<sup>58</sup> or ‘data points’, can not trump or evade the normative force of the law of negligence—I bear the cost of harms I suffer unless they were caused by the wrongdoing of someone else, whereupon it is right that the cost should be shifted to them.

## 6. *Broad Duty of Care Revisited*

With all this in mind, it is timely to return to *Calvert* and re-analyse Briggs J’s rejection of a broad duty of care<sup>59</sup> owed by gambling operators

<sup>55</sup> For an excellent account see Siddhartha Mukherjee, *The Emperor of all Maladies: A Biography of Cancer* (Fourth Estate 2011), Part Four.

<sup>56</sup> See Patrick Radden Keefe *Empire of Pain* (Picador, 2021).

<sup>57</sup> Cassidy (n 45) 19.

<sup>58</sup> Cassidy (n 45) 20.

<sup>59</sup> Pleaded as follows: ‘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’.

to their customers, with regard to gambling disorder, to see if his reasoning survives these legal and technological developments.

He began by rejecting the claimant's argument that WH 'assumed responsibility' to anyone with a gambling disorder by adopting its social responsibility policy. His reasons were first, to point to the fact that it cannot 'properly be said of "problem gamblers" as a class that they uniformly suffer from such an impairment in their ability to control their own gambling that it would be proper for the law to treat them, without more, as being so vulnerable as to require special treatment, even in the absence of a request for it'.<sup>60</sup> Relatedly, whilst acknowledging that there is a 'sub-class of "problem gamblers", namely pathological gamblers, for whom it can properly be said that control of their gambling has become impossible', he nonetheless thought it 'wholly unrealistic to suppose that in the ordinary course of its business a bookmaker can be expected to be able to identify that sub-class by way of what amounts to a process of medical diagnosis'.<sup>61</sup> Certainly a telephonist in WH's call centre in 2006 might not have been able to identify someone with gambling disorder, but nowadays as we have seen the gambling operators' software does it accurately and automatically. If artificial intelligence can detect someone whose gambling is out of control, in order to target marketing, they could easily do so to meet the broad duty of care.

The judge's other reason for rejecting the submission that WH ought to be regarded as having assumed responsibility to anyone appearing to suffer from gambling disorder was that, if WH's employee had activated the self-exclusion agreement, this would have included an express disclaimer of liability, and disclaiming is inconsistent with assuming responsibility.<sup>62</sup> As the judge acknowledged, this objection only has force if the case is framed as assumption of responsibility for pure financial loss. Once the gist of the claim is seen as personal injury in the form of psychiatric harm, this argument has no force, since businesses are prohibited by statute from excluding liability for death or personal injury.<sup>63</sup>

In today's conditions, there will frequently be a more general objection to the whole premise. As we have seen, assumption of responsibility is simply not needed for the mainstream fact pattern, where a defendant actively causes physical harm to the claimant, worsening the claimant's position relative to their position before the breach of duty.

<sup>60</sup> [2008] EWHC 454 (Ch) [169].

<sup>61</sup> [2008] EWHC 454 (Ch) [170].

<sup>62</sup> [2008] EWHC 454 (Ch) [171].

<sup>63</sup> Unfair Contract Terms Act 1977 s 2(1); Consumer Rights Act 2015 s 65.

Assumption of responsibility is only required as a 'trump card' where the default setting is 'no liability', so it is needed for claims for pure financial loss, and is the most significant exception grounding liability for failing to help or benefit the claimant. That was the correct categorisation of WH's breach, failing to protect Calvert by not activating the requested self-exclusion. But in contrast, the sorts of egregious breaches of the Gambling Commission's codes of conduct and licensing conditions that have become familiar today often involve *actively harming* the claimant, in the sense of causing or exacerbating gambling disorder. Examples might include inducing addiction in a young or vulnerable customer by accepting bets that should not have been accepted; using software and artificial intelligence to target and lure back a former online gambler, bombarding them with inducements and free bets; or doing so via the personal attention of a VIP scheme; in each case tragically sometimes leading to suicide. I will come back to these issues when discussing breach of duty.

Returning to the judge's reasons for rejecting the proposed broad duty of care, he turned next to the familiar *Caparo* factors,<sup>64</sup> which must be met whenever it is proposed to extend the duty of care to a novel factual situation.

The first is foreseeability of damage. This factor is virtually always satisfied, as it was in *Calvert*, since the law treats it as an extremely low hurdle, effectively allowing 'foreseeability as an incredibly unlikely possibility' to suffice. It is, however, a central and repeated concept in the law of negligence, also at the heart of the tests for breach of duty<sup>65</sup> and remoteness of damage.<sup>66</sup> That is why it is so significant for a negligence lawyer that, in today's digital world, gambling operators have such detailed knowledge of their customers' behaviour, software and artificial

<sup>64</sup> Synthesised from earlier authority by Lord Bridge in *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL) 617–618.

<sup>65</sup> Likelihood of harm forms part (but not all) of the evaluation of breach, but there is also said to be a threshold test of foreseeability: if the harm was truly unforeseeable, as a matter of law the defendant cannot have been at fault for causing or failing to prevent it. This was certainly the historical position when juries still decided negligence actions, as in *Blyth v Birmingham Waterworks Co* (1856) 11 Ex 781 (Ct of Ex), where the Court of Exchequer held the judge should not have left the question of fault to the jury because the threshold test was not met. As Bramwell B put it, 'it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened'.

<sup>66</sup> *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co (The Wagon Mound) (No 1)* [1961] AC 388 (PC).

intelligence allowing them to recognise and know, not just foresee, a particular customer's descent into gambling disorder.

The second *Caparo* factor is 'a relationship between the party owing the duty and the party to whom it is owed characterised by the law as one of "proximity" or "neighbourhood"'. On this issue, Briggs J said that

the law should be very slow to recognise a sufficient proximity to justify a requirement to take protective steps to restrain a gambler from exercising his liberty to gamble on his own responsibility, where his status as a problem gambler may mean no more than that he is experiencing mild and occasional difficulties of control. Again, I emphasise that the broad submission ... assumes a duty of care to all problem gambler customers, regardless whether they seek the bookmaker's help.<sup>67</sup>

This argument is no longer particularly convincing, now that artificial intelligence can differentiate and detect someone whose gambling is out of control. More fundamentally, this smacks of an unfortunate version of the floodgates argument, whereby just because there might be a large number of potential claimants, that somehow lessens the defendant's responsibility.<sup>68</sup> Each individual gambler is in a contractual relationship with the defendant, much greater 'proximity' than is usual in a purely tortious negligence claim, particularly given the individual targeting gamblers now experience.

The final *Caparo* factor is a general requirement that there should be no policy objections to the extension of the duty of care to a novel situation, expressed that, 'the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other'. Again Briggs J held that this was not satisfied, because a broad duty 'would place a burden on the bookmaker pursuant to which the problem gambler could freely take home his profits, but look to the bookmaker for the return of his losses, without even seeking the bookmaker's assistance to help him control his gambling'.<sup>69</sup> This reasoning is relevant only to the main focus of *Calvert*, the claimant's financial loss claim, so is irrelevant to a claim pleaded as personal injury in the form of psychiatric harm. But even on its own financial terms, the reasoning is

<sup>67</sup> [2008] EWHC 454 (Ch) [172].

<sup>68</sup> An objection articulated, in a very different context, by Howarth 'Poisoned Wells: "Proximity" and "Assumption of Responsibility" in Negligence' (2005) 64 CLJ 23.

<sup>69</sup> [2008] EWHC 454 (Ch) [173].

unconvincing. As the HL Select Committee Report pointedly said, ‘We ... have little sympathy with an operator who has to pay winnings when the reason for this is simply his own failure to give effect to a self-exclusion agreement’.<sup>70</sup> There is a further counterargument, namely that gambling companies do not let successful customers carry on gambling. Cassidy describes a business model ‘based on attracting and retaining losing punters and turning down business from winners’, whereby gambling companies ‘have downloaded the risks generated by their products onto their customers’.<sup>71</sup>

Overall, the 2008 rejection of a broad duty of care owed to gamblers in respect of the development or worsening of gambling disorder, with consequent financial loss, potentially suicide, is unjustifiable in today’s gambling context. A broad duty of care should not be exiled to the outermost reaches of the common law, but be rehabilitated into the mainstream. Its scope would be appropriately limited, owed only to those whom the defendant knows or ought to know are slipping into addiction and gambling disorder, as befits the cautious, incremental approach to common law development, the law of negligence in particular.<sup>72</sup> It is, though, worth noting that if people were being harmed in this way by a tangible product—like a medicine, a detergent, a cosmetic—they would not need to invoke negligence to recover compensation. Instead they would rely on a statutory regime (derived from Europe) of no-fault liability for dangerously defective products.<sup>73</sup> Maybe the expansion of this regime will be the focus of future reform proposals, in response to the intangible dangers of smartphones, social media and gambling products. But for now, we will continue our focus on the law of negligence.

## 7. Remaining Elements of the Negligence Cause of Action

### A. Breach

Establishing a duty of care is just the beginning—there can be no liability unless the claimant establishes that the duty was breached. This is extremely important, yet is frequently glossed over. As Deakin has

<sup>70</sup> HL Select Committee Report (n 4), [382].

<sup>71</sup> Cassidy (n 45) 117.

<sup>72</sup> See the seminal expression by Brennan J in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 (High Court of Australia), ‘It is preferable, in my view, that the law should develop novel categories incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care...’

<sup>73</sup> Consumer Protection Act 1987.

written, in the context of negligence claims against social workers carrying out their child protection function, 'A jurisprudence focused on "duty" inevitably means that a more nuanced account of what amounts to fault in complex settings such as this will be slow to emerge'.<sup>74</sup> The exclusive emphasis on duty tends to exacerbate the fear of a 'compensation culture', since it overlooks the crucial point that a defendant, in whatever walk of life, will only be liable if they behaved unreasonably, judged objectively. The same would of course be true for gambling operators.

The breach in *Calvert* was straightforward, because of the narrow nature of the duty that the judge accepted—WH agreed to self-exclude Calvert, then failed to do so. For the suggested broad duty, how will breach be tested?

As an aside, as we have seen, the recent White Paper has rejected the recommendation in the HL Select Committee Report to adopt the separate tort of breach of statutory duty, which would have made the Gambling Act civilly actionable. In other words, establishing a breach of the Gambling Act's provisions, codes of practice and licensing conditions would have triggered civil liability, subject to the other requirements of the tort and relevant defences.

The law of negligence tests breach differently. The test is whether, judged objectively, the defendant behaved reasonably or came up to the standard of the hypothetical reasonable person engaged in the relevant activity within the scope of the duty of care.<sup>75</sup> So whilst, unlike for the separate tort of breach of statutory duty, breach by the defendant of a statutory code of practice or licensing provision is not conclusive, nonetheless for the tort of negligence that would be very persuasive evidence of unreasonable behaviour.

This would certainly catch the various well-publicised instances of fines rendered by the Gambling Commission, each a shocking account of gambling operators causing or exacerbating gambling disorder by flagrant breaches of the codes of practice. In March 2023, William Hill group companies were fined a record £19.2m for numerous, egregious breaches of the social responsibility and money laundering regulations, including the following:

<sup>74</sup> Simon Deakin, 'Liability in Negligence in Providing A Public Good: Really Not So Different?' (2019) 78 CLJ 513, 516.

<sup>75</sup> 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do'. *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 (Ct of Ex), 784 (Anderson B).

One customer was allowed to open a new account and spend £23,000 in 20 minutes without any checks. Another customer was allowed to open an account and spend £18,000 in 24 hours without any checks. And a third customer was allowed to open a new account and spend £32,500 over two days without any checks.<sup>76</sup>

In another disturbing case, Ladbrokes and PaddyPower allowed a customer, who had been left seriously disabled and brain-injured by medical negligence, to gamble away £500,000 over 3 years, funds that came from the compensation that they knew was his only source of income.<sup>77</sup>

The civil courts have occasionally examined behaviour of this kind by gambling operators. *Dhir v Flutter Entertainment plc*<sup>78</sup> involved a claim by Amarjeet Dhir, a business associate of the severely addicted gambler Tony Parente, against Paddy Power, attempting to recover loans Parente had obtained dishonestly from him, then gambled away. Part of Dhir's argument emphasised the lack of any due diligence by the operator's VIP scheme, allowing Parente to gamble without any investigation into the source of his apparent riches. Griffiths J was contemptuous of the evidence given by Paddy Power's VIP scheme staff:

witnesses ... stonewalled, denying that there was a breach of policy ... or that the policy itself was inadequate, or that allowing and positively encouraging months of high-stakes gambling before even seeking, let alone obtaining, satisfactory evidence that Mr Parente could afford it, or had legitimate sources of income or wealth to pay for it, was wrong... in my judgment, Paddy Power knew that it was dealing with a compulsive gambler who could not afford what he was doing, and Paddy Power did not really care.<sup>79</sup>

So for the common law of negligence, failing to comply with industry codes of practice is highly persuasive evidence of breach, but ultimately the test is whether the defendant failed to come up to an objective

<sup>76</sup> <<https://www.gamblingcommission.gov.uk/news/article/william-hill-group-businesses-to-pay-record-gbp19-2m-for-failures>> Date accessed April 2023.

<sup>77</sup> <<https://www.theguardian.com/society/2020/aug/19/bookmakers-gambling-adict-squander-compensation-liam-mccarron>> Date accessed April 2023.

<sup>78</sup> [2021] EWHC 1510 (QB).

<sup>79</sup> *Ibid* at [110]. Dhir's claim against PaddyPower was nonetheless unsuccessful, because he failed to establish a proprietary claim to the money loaned and could therefore not trace it into PaddyPower's hands.

standard of reasonable care.<sup>80</sup> A useful general guide to how this is analysed is to imagine the hypothetical reasonable person balancing various relevant factors, in deciding whether to take a particular course of action. Lord Hoffmann has explained that common law negligence 'depends upon assessing ... not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other'.<sup>81</sup> Frankly, where a gambling operator knows or ought to know that a particular customer is succumbing to gambling disorder, with a possibility of serious harm, even suicide, and where preventative measures are not difficult to implement, a gambling operator would have very little chance of persuading a court that it was reasonable not to act so as to maintain a source of profit.<sup>82</sup>

A useful comparison can be made with how breach is tested in stress at work cases, analogous because they involve the infliction of psychiatric harm, where the parties are in a contractual relationship, this time one of employment. The courts' approach mirrors the broad duty of care we have accepted, and also provides a model for testing breach for operators who know or ought to know that their customer is developing gambling disorder. In a series of cases of workplace stress and psychiatric harm, Hale LJ in the Court of Appeal formulated the test as follows, 'Unless the [employer] knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job'.<sup>83</sup> This test was successfully applied to the claim by a school teacher in *Barber*, on appeal to the House of Lords.<sup>84</sup> Having been driven to the verge of collapse with an

<sup>80</sup> In a different context, occasionally the courts conclude that a defendant who followed their industry's universal common practice was nonetheless in breach, as occurred in *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] AC 296 (PC) condemning universally adopted conveyancing practice in Hong Kong as unreasonable.

<sup>81</sup> *Tomlinson v Congleton Borough Council* [2003] UKHL 37, [2004] 1 AC 46 [34].

<sup>82</sup> As Denning LJ pointed out in an unsuccessful claim by a firefighter against his employer, *Watt v Hertfordshire CC* [1954] 1 WLR 835 (CA), 'It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But *the commercial end to make profit* is very different from the human end to save life or limb' (emphasis added).

<sup>83</sup> *Barber v Somerset County Council and other appeals* [2002] EWCA Civ 76, [2002] 2 All ER 1 [29].

<sup>84</sup> [2004] UKHL 13, [2004] 1 WLR 1089.

unmanageable workload, Barber asked for help, but nothing changed and his mental health collapsed. On appeal, the House of Lords held his employer liable, since once the employer knew he was vulnerable, they should have taken steps to protect him. As Lord Walker said:

Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event Mr Barber's condition should have been monitored, and if it did not improve, some more drastic action would have had to be taken. Supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff.<sup>85</sup>

VIP schemes run by gambling operators will certainly have this sort of individual knowledge, which would include 'blind eye' knowledge, deliberately avoiding making enquiries so as not to discover salient facts. Moreover, as has been seen, gambling operators have the AI software to recognise patterns and detect gambling disorder, which they use for targeting advertising and inducements. Overall, there should be no difficulty in such cases establishing breach of a broader common law duty of care.

### B. *Factual Causation*

This is potentially the hardest part of the cause of action to establish, because the claimant would need to show that the defendant's *breach* factually caused their harm, not just gambling generally. The standard test that works well in most situations is 'but for',<sup>86</sup> and indeed often it is too obvious to require much analysis. By way of a simple example, where a defendant drives negligently and smashes into the claimant's leg, it is obvious that, but for the defendant's breach, the claimant's leg would not spontaneously have smashed. The leg was fine before the tort, now it is injured. By analogy, in our context, the most straightforward causal link would involve a victim with no history of any psychiatric harm or other addictive behaviours or comorbidities whatsoever prior to the breach—perhaps someone who became hooked on gambling as

<sup>85</sup> Ibid [69].

<sup>86</sup> *Clerk & Lindsell on Torts* (2nd supp, 23rd edn, Sweet & Maxwell 2022) at 2.09, 'The "but for" test asks: would the damage of which the claimant complains have occurred "but for" the negligence (or other wrongdoing) of the defendant? Or to put it more accurately, can the claimant adduce evidence to show that it is more likely than not, more than 50 per cent probable, that "but for" the defendant's wrongdoing the relevant damage would not have occurred'.

a child—where the relevant breach was letting them start gambling in the first place.

The test is more complex to apply in our paradigm case, where the defendant's breach actively worsens or, as in *Calvert*, fails to prevent the worsening of, the claimant's existing gambling disorder (originating without fault on the part of the defendant). Put simply, causation can be satisfied where the defendant's breach materially contributes to the development of personal injury, alongside other non-tortious factors,<sup>87</sup> or where the defendant with a duty to act failed to prevent an existing condition worsening.<sup>88</sup> The difficulty then shifts to quantifying damages—how to work out which bit of the claimant's eventual position should be the responsibility of the claimant. A good example is the stress at work case just discussed, *Barber v Somerset County Council*. Mr Barber recovered damages for his breakdown, even though the breach was just the straw that broke the camel's back, his mental health was already fragile by virtue of stress at work that was not tortious. That point was dealt with at the later stage of quantifying his damages for loss of future earnings, to take account 'of the chance that, if he had continued with a similar teaching job, his health might have broken down in the same way'.<sup>89</sup> It is worth noting that the courts have not made an equivalent suggestion in a case involving suicide, not even in *Reeves*,<sup>90</sup> where the claimant who took his life in police custody was already suicidal on arrival in the cells.

A further difficult issue in a case of gambling disorder might be the more abstract, and prior, one—establishing that unreasonable gambling practices are capable of causing or contributing to gambling disorder at all, to the satisfaction of the legal standard of proof—since statistical connection does not suffice for proof of causation. This may sound extraordinary and counter-intuitive in our context, but there is a bleak analogy in the history of tobacco litigation in the UK. The only UK case to reach trial was a Scots first instance decision, *McTear v Imperial*

<sup>87</sup> See *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 (HL Sc). There is some confusion over the correct approach for 'divisible' versus 'indivisible' injuries which is beyond the scope of this article, but it seems likely that psychiatric harm such as gambling disorder would be regarded as indivisible.

<sup>88</sup> A relatively common allegation in medical negligence cases, see for example *Williams v The Bermuda Hospitals Board* [2016] UKPC 4, [2016] AC 888, critiqued Jane Stapleton and Sandy Steel, 'Causes and Contributions' (2016) 132 LQR 363.

<sup>89</sup> [2004] UKHL 13 [38].

<sup>90</sup> N 29.

*Tobacco*.<sup>91</sup> The claimant failed on every single point—it was an unbelievably, extraordinarily defendant-sided decision. The judge, Lord Nimmo Smith found (amongst many other things) that Mr McTear’s widow had not proved that smoking causes lung cancer, a conclusion described by one commentator as an ‘unworldly high standard and an extraordinarily easy escape route for a corporation’.<sup>92</sup> It is to be hoped that establishing causation would be easier in the gambling context, because only one thing causes gambling addiction, and that is gambling, so claimants would face none of the epidemiological problems associated with showing causation in tobacco or industrial disease litigation, with complex disease aetiology. Nonetheless, what will count will be the robust scientific studies, finally being commissioned, to demonstrate the mechanism by which gambling disorder develops. There is a lot more that could be said about causation in this context,<sup>93</sup> but in summary, the factual causation hurdle is likely to be tricky, but not insurmountable.

### C. *Scope of Liability for Consequences*

Next we need to consider ‘scope of liability for consequences’, traditionally but confusingly labelled ‘legal causation’—the normative value judgment that determines whether, despite being in breach of duty and that breach being a factual cause of the claimant’s harm, the defendant should nonetheless be exonerated.<sup>94</sup> This is the place in the analysis in which gambling companies would wish to emphasise the ‘problem gambler’ rhetoric, that even though the company might have been at fault and that fault factually caused the claimant’s harm; nonetheless, the claimant made the autonomous decision to continue gambling, even decided to take their own life. This sort of reason to exonerate the defendant is traditionally, but confusingly, described as an intervention which ‘breaks the chain of causation’. As Lord Nimmo Smith said of the deceased smoker in *McTear v Imperial Tobacco*, ‘The individualist philosophy [of

<sup>91</sup> (2005) 2 SC 1, Court of Session (Outer House). The decision ran to approximately 350,000 words, longer than many novels, including *Ulysses* by James Joyce!

<sup>92</sup> Mark Mildred, ‘Personal Injury - Death – Liability’ (2005) 4 JPI Law 141, 144.

<sup>93</sup> I have, for example, assumed that only one gambling operator is culpable and responsible for the claimant’s harm, avoiding the problem of multiple tortfeasors and scientific uncertainty seen in *Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32 (HL).

<sup>94</sup> The other branch of this normative question, remoteness of damage under *Wagon Mound (No 1)*, fn [66] above, should pose no difficulty in a gambling disorder claim. As long as the type of harm was foreseeable (with ‘type’ defined extremely broadly, *Page v Smith* [1996] AC 155 (HL)), its extent need not be, so a defendant would not escape liability for severe psychiatric harm, even suicide.

the common law] requires that individuals must live with the legal consequences of their own informed choices'.<sup>95</sup>

This argument should, however, have no currency in a negligence claim involving gambling disorder, because it does not apply to claimants whose autonomy was impaired *as a result of* the defendant's breach. In the House of Lords decision in *Corr v IBC Vehicles Ltd*,<sup>96</sup> Thomas Corr suffered a horrific injury at work as a result of his employer's negligence. Before the accident he had been a happily married, easy-going man; but after it he developed depression, unsurprisingly as he endured repeated operations and was left with PTSD and chronic pain. His depression worsened and did not respond to treatment, even electro-convulsive therapy. Six years after the accident, tragically he took his own life. His employer denied responsibility for Corr's death, arguing (inter alia) that his deliberate decision to commit suicide 'broke the chain of causation' and exonerated the employer. The House of Lords disagreed. As Lord Bingham said,

Corr's suicide was not a voluntary, informed decision taken by him as an adult of sound mind making and giving effect to a personal decision about his future. It was the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgments about his future, such illness being, as is accepted, a consequence of the employer's tort. It is in no way unfair to hold the employer responsible for this dire consequence of its breach of duty.<sup>97</sup>

Suicide by someone overwhelmed by gambling disorder should be treated the same way.

#### D. Defences

Space does not permit a discussion of all the possible defences that might need to be considered in a negligence action involving gambling disorder, such when a claim would be time-barred under the Limitation Act 1980, or regarded as barred for illegality or *ex turpi causa* (which might be pleaded when a claimant, who stole money to feed their addiction and received a prison sentence, sought damages to

<sup>95</sup> (2005) 2 SC 1 at 7.179, citing Lord Hoffmann in *Tomlinson*.

<sup>96</sup> [2008] UKHL 13, [2008] 1 AC 884, decided in the same year as the Court of Appeal's decision in *Calvert*.

<sup>97</sup> *Corr* [16].

compensate for their incarceration).<sup>98</sup> Nor is it possible to consider the quantification of damages, or vital procedural issues such as liability for costs.

One defence does, however, merit a brief mention, the partial defence of contributory negligence. This statutory defence means the damages the defendant must pay are reduced<sup>99</sup> if the claimant was also partly to blame for their injury or loss—in the words of the statute, where the claimant suffered ‘damage as the result partly of his own *fault* and partly of the fault of any other person.’<sup>100</sup> The paradigm example might be a road accident, in which the claimant is injured by a negligent driver, but where the claimant had not been wearing a seatbelt. It is not impossible that a court might wish to mark a claimant’s own responsibility for their descent into gambling disorder by making a deduction for contributory negligence. This possibility arises in the context of suicide, because of the exceptional invocation of the defence in *Reeves v Commissioner of Police of the Metropolis*.<sup>101</sup> Having decided that the deceased’s act of committing suicide did not exonerate the defendant entirely,<sup>102</sup> the House of Lords decided to reduce the damages by 50% to reflect the deceased’s contributory negligence. This was a somewhat surprising application of the language of a statute dealing with contributory *negligence*, but was the only jurisprudential tool available to the court to apportion liability, in the context of victim who was already resolutely suicidal when he came into police custody. In other words, it was a failure to protect case. What of our proactive fact pattern, where a defendant’s breach actively causes harm, where it makes the victim suicidal?

<sup>98</sup> Lord Hoffmann in *Gray v Thames Trains* [2009] UKHL 33, [2009] 1 AC 1339, expressed at [32] a narrow, more specific form of the *ex turpi causa* principle, ‘that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage’. This approach was endorsed by the Supreme Court in *Henderson v Dorset Healthcare NHS Foundation Trust* [2020] UKSC 43, [2021] AC 563.

<sup>99</sup> ‘To such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage’—Law Reform (Contributory Negligence) Act 1945 s 1(1).

<sup>100</sup> Law Reform (Contributory Negligence) Act 1945 s 1(1) (emphasis added).

<sup>101</sup> [2000] 1 AC 360 (HL).

<sup>102</sup> Since it would ‘make nonsense of the existence of such a duty if the law were to hold that the occurrence of the very act which ought to have been prevented negated causal connection between the breach of duty and the loss’, *Ibid* 367–68, *per* Lord Hoffmann. It should be noted that existence of the duty was conceded by the Metropolitan Police, so was not the subject of argument.

Contributory negligence was not pleaded as a defence by the employer in the *Corr* case, but Lord Scott commented, *obiter*, that he would have supported a reduction of 20% in the damages payable to Corr's family, for his 'fault' in committing suicide.<sup>103</sup> The reasoning was based on *Reeves*, despite the fundamental difference of fact pattern that the defendant employer made Corr suicidal, and on the supposition that if the victim injured someone else in the course of a suicide attempt, they (or their estate) would be liable to that other person in negligence. This latter argument is unconvincing, since it assumes that contributory negligence is tested in the same way as for breach of a duty of care; this is not correct. For example, an elderly claimant who is harmed partly because of the impairments of old age will not experience a deduction for contributory negligence,<sup>104</sup> whereas an elderly defendant who harms someone else for the same reason will be judged to the usual, objective standard of care.<sup>105</sup> Overall, Lord Scott's *obiter* suggestion is indefensible, the law should not treat suicide, triggered by severe, untreatable psychiatric illness caused by the defendant's wrongdoing, as the sufferer's 'fault'.

### 8. *The Significance of a Common Law Negligence Claim*

With the White Paper's promise of enhanced regulatory protection to reduce instances of gambling disorder, it might be asked what is the point of clamouring for civil liability for gambling disorder.

Most obviously, it brings financial compensation for a sufferer, or for their estate and dependents<sup>106</sup> if, tragically, they have taken their own life. It is worth remembering that not one penny of the fines imposed by the Gambling Commission for breaches of licensing conditions and codes of conduct will go to compensate the victims of those breaches.<sup>107</sup> For that, we need the common law.

Deterrence is also important, coming from the need to insure against liability to pay damages and the adverse publicity from high profile litigation. As the HL Select Committee pointed out, 'the current legal and

<sup>103</sup> Lords Neuberger and Mance expressed sympathy with Lord Scott's view but declined to address the issue, as the matter had not been pleaded so no relevant findings were made by the trial judge; Lords Bingham and Walker would have made no reduction.

<sup>104</sup> *Daly v Liverpool Corporation* [1939] 2 All ER 142 (Assizes).

<sup>105</sup> For example, in *Roberts v Ramsbottom* [1980] 1 WLR 823 (QB) no lowering of the standard of care was made, or even suggested, for the elderly driver.

<sup>106</sup> Under the Fatal Accidents Act 1976.

<sup>107</sup> In practice, gambling operators may make voluntary settlements with their victims, but this is not the same as a legal entitlement to damages.

regulatory context does not sufficiently deter gambling operators who stand to benefit from allowing problem gamblers to lose money'.<sup>108</sup>

A further advantage is the procedural regime for the discovery of documents in litigation.<sup>109</sup> It seems that one of the most significant long-term benefits of tobacco litigation in the USA was the compulsory discovery of documents from the heart of the industry, otherwise guarded with considerable secrecy.<sup>110</sup> The same would apply in this context, letting light into the records and protocols of gambling operators.

This supports another role, one for which the law of negligence is not ideally suited but which sometimes assumes great importance, especially for families and loved ones of someone who dies, or takes their own life, as a result of negligence. This is to give them their 'day in court', to hear a detailed explanation for what happened, with the benefit of cross-examination. This role is sometimes served by an inquest or a public inquiry, but often it motivates claimants to initiate civil proceedings, even where very little might be obtained in financial compensation.<sup>111</sup>

Finally, and relatedly, there is a *symbolic* importance, a recognition of the role of the common law in a civilised society. That is that no corporation, no individual, should be too wealthy or powerful to enjoy immunity from its scrutiny, its standards of reasonable behaviour.

### 9. Conclusion—Beyond Negligence?

The tort of negligence, with its focus on defendants who fail to come up to an objectively reasonable standard and cause reasonably foreseeable loss, serves us very well in so many areas. I think it can be of use in cases

<sup>108</sup> [384].

<sup>109</sup> Civil Procedure Rules Part 31—Disclosure and Inspection of Documents.

<sup>110</sup> Muckherjee (n 55), 270, discussing *Cipollone v Liggett Group, Inc.*, 505 U.S. 504 (1992): Cipollone's lawyer Marc Edell's 'insistence that he needed to know what cigarette manufacturers knew about smoking risks allowed him to ask the courts for unprecedented access to the internal files of Philip Morris, Liggett and Lorillard. Armed with powerful legal injunctions to investigate these files, Edell unearthed a saga of epic perversity. Many of the cigarette manufacturers had not only known about the cancer risks of tobacco and the potent addictive properties of nicotine, but had also actively tried to quash internal research that proved it'.

<sup>111</sup> The instantaneous death of a young adult with no dependents attracts virtually no financial compensation, yet of course money is not what motivates bereaved parents to sue in negligence. For example, Trevor Hicks pursued a negligence claim in respect of the death of his daughters at the Hillsborough disaster and appealed all the way to the House of Lords, *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65 (HL).

of gambling disorder and consequent suicide, no longer thought of as beyond the outermost limits of the common law galaxy, although as has been seen it is not entirely straightforward to map these fact patterns onto its requirements.

It is notable that the common law is traditionally very good at protecting individualist values when they involve money and property—even the right of someone who owns a glass penthouse not to be overlooked.<sup>112</sup> The brave new digital, de-personalised world of gambling in the 21st century has been accused of viewing gamblers, not as individuals but as units of profit generation. Ironically the common law already responds to that designation, where it is the *profit* that is under threat. If Ladbrokes intentionally induce the CEO of Betfred to breach their contract of employment and come and work for Ladbrokes instead, Ladbrokes would be liable to Betfred in tort,<sup>113</sup> for substantial damages. It is not entirely flippant to ask whether we need a new tort: intentionally (or recklessly) inducing or exploiting gambling disorder? In the 21st century we have digital industries with the ability to tailor their products and target individuals for profit; in the case of gambling operators to detect with precision when those individuals are slipping into addiction. When that knowledge is used, not to protect the individual but to exploit their addiction for profit, leading to tragic and pointless loss of life, those responsible should be held accountable. The common law can surely rise to the challenge.

<sup>112</sup> *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4, [2023] 2 WLR 339.

<sup>113</sup> *Lumley v Gye* (1853) 2 E&B 216 (Ct of QB).