

Poker and the Law: Is It a Game of Skill or Chance and Legally Does It Matter?

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THE PARAMETERS OF LEGAL POKER PLAYING are still unclear. On Nov. 2, 2005, Baltimore police raided the Owl's Nest, a private club, charged 80 Texas Hold 'Em poker players with illegal gambling, and seized more than \$25,000 in cash and more than \$16,000 in poker chips. It may have been the largest raid since 1932 during Prohibition. A vice detective opined that the players "could receive a year in jail or a \$1,200 fine."¹ Fortunately for the players, the charges were dismissed because the police had used the wrong statute.²

In contrast, California allows local governments to regulate and tax its approximate 94 card rooms.³ The games are essentially parimutuel events, unlike banked games. Parts of the California regulatory process might seem to border on the absurd, e.g., poker operators may only take money out of a pot ("rake the pot") three times.⁴ Farther north, a bill introduced in the North Dakota Legislature would have amended that state's law so that "gambling does not include: (a) lawful contests of skill, including Internet live poker. . . ." ⁵ But it did not succeed.

Whether poker is a game of skill or of chance seems to be an issue left to the judiciary. There are five major cases before various courts, in the United States and beyond its borders, on whether poker is primarily a game of skill, and if so, whether the law prohibits it. Cases are

currently pending in North Carolina, London, Northern Ireland, France and South Australia.

UNITED STATES

In North Carolina on Nov. 15, 2004, the Joker Club, LLC, sought a declaratory judgment in a North Carolina Superior Court on whether poker was a game of skill, which in the opinion of its attorneys would make it legal since North Carolina law only prohibits games of chance.⁶ The Joker Club had leased facilities for poker games, but claimed it could not open for business until it received a favorable court ruling.⁷

¹ Lynn Anderson & Gus G. Sentementes, *Police raid folds poker game; 80 are charged with illegal gambling at private club near Camden Yards*, BALTIMORE SUN, Nov. 4, 2005, at A1. "On the door, signs and stickers announce that that building is a private club for 'members only.' One sign on an outside wall reads: 'No Trespassing. Violators will be shot. Survivors will be shot again.'" *Id.*

² *Prosecutors drop charges in Md. Poker raid*, YAHOO! NEWS, Nov. 10, 2005, <<http://news.yahoo.com>>. "Had these 80 players been charged appropriately, we might have taken a different route and prosecuted them," said Assistant State's Attorney Patricia Deros. *Id.*

³ CAL. BUS. & PROF. CODE § 19960.

⁴ I. Nelson Rose, *Prohibiting Cross-Border Wagers*, 9 GAMING L. REV. 599, 600 (2005).

⁵ 2005 N.D.H.B. 1509 (N.D. 2005). The Justice Department was primarily responsible for the defeat of the bill. See Letter from Laura H. Parsky, Deputy Assistant Attorney General, U.S. Department of Justice, to Wayne Stenehjem, Attorney General of North Dakota (Mar. 7, 2005) (on file with authors).

⁶ John Stevenson, *Bets are off while firm sues DA*, HERALD-SUN (Durham, N.C.), Nov. 30, 2004, at C14.

⁷ The lease agreement required the Joker Club to "provide landlord with satisfactory proof from the Durham County District Attorney that the operation of a poker game upon said premises will not violate any criminal laws of the State of North Carolina." *Joker Club, LLC v. Hardin*, 4CVS06034 (N.C. Super. complaint filed Nov. 15, 2004).

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The defendant, James Hardin, then the county district attorney, responded to the inquiry by the attorney for the Joker Club by stating that poker “does not comply with North Carolina law”⁸ and that even if it were a game of skill, “that’s [prohibited] gambling in North Carolina.”⁹ Hardin, who stated that even poker games at a player’s home were “illegal technically speaking”, continued: “If a complaint were filed with, say, the Durham City Police Department or Durham Sheriff’s Department and they went to a location and found folks playing cards for money, they would be subject to arrest under our law. . . . Now what’s the probability of that happening?”¹⁰

The Attorney General’s Office of North Carolina, representing Hardin, filed a motion to dismiss for failure to state a cause of action. Assistant Attorney General David J. Adinolfi II stated:

We’re not talking about shuffleboard here. . . . We’re not talking about archery. Poker is simply not legal. . . . The turn of a card is what settles it all. The best player in the world can get beat by an amateur. Chance predominates. Chance overwhelms skill.

The cards are dealt face down. You can be as skilled as possible. You can do all the statistical analyses. But chance predominates when you flip the card over. It’s just that simple. You can’t will the card to be an ace when it’s a deuce.¹¹

North Carolina law concerning poker and skill was unclear. N.C. Gen. Stat. § 14-292 states:

any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a Class 2 misdemeanor.

Caselaw had long required that a gambling violation required proof for a conviction that chance alone or that chance predominated over skill. In *State v. Eisen*,¹² the North Carolina ap-

pellate court concluded that blackjack as a matter of law could not be considered a game where skill predominated over chance: “Whether blackjack as described in the evidence was a game of chance or one of skill was a question for the jury to decide from the evidence. . . .”¹³ The court did opine that “the element of chance clearly dominates the element of skill. . . .”¹⁴ In *Collins Music Co. v. North Carolina Alcoholic Beverage Control Commission*,¹⁵ the appellate court concluded that chance in video poker machines predominated over skill. In dicta, the court stated

all of the skill elements associated with the ordinary game of draw poker are absent in the video version. The game of draw poker, played against other individuals, permits a player to use psychology, bluffing, and knowledge of the law of probabilities relative to the game of poker, to increase his potential win relative to the total number of games played. Psychology and bluffing have no effect on the final outcome of play when playing electronic video poker.

Thus, it was a reasonable possibility for the judge to conclude that poker was a game where skill predominated over chance.

Yet there is an archaic 1848 Supreme Court of North Carolina case, *State v. Gupton*,¹⁶ which discussed “the idle and vicious practice of gaming” and the North Carolina statute that pro-

⁸ Letter from James E. Hardin Jr., District Attorney, 14th Prosecutorial District, Durham, N.C., to Marcus E. Hill, attorney for the Joker Club, Sept. 24, 2004, attached as Exhibit C to *Joker Club, LLC v. Hardin*.

⁹ Stevenson, *supra* note 6.

¹⁰ Benjamin Niolet, *Chance or skill? Suit asks; Poker club owners put issue to courts*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 30, 2004, at A1.

¹¹ Dan Katz, *North Carolina judge nixes proposed poker club*, POKER SOURCE ONLINE, May 24, 2005, <<http://www.pokersourceonline.com/news/north-carolina-judge-proposed-poker-club.asp>> (quoting Assistant Attorney General David J. Adinolfi II).

¹² 192 S.E.2d 613, 616 (N.C. Ct. App. 1972).

¹³ *Id.* at 616.

¹⁴ *Id.*

¹⁵ 451 S.E.2d 306, 308 (N.C. Ct. App. 1994).

¹⁶ 1848 N.C. Lexis 67, at *4 (N.C. 1848).

hibited games of chance. In interpreting what constituted a game of chance, the court concluded that chess, bowls, billiards, etc., were games of skill. The court, however, opined that dice games and “the hand at cards [which] depends upon a dealing with the face down, exhibit the [two] classes of games of chance.”¹⁷

Joker Club, at a hearing on May 23, 2005, introduced testimony from various experts. Roy Cooke, a 16-year professional poker player and author of books and articles on poker, responded to the following question as to what might happen if the lawyer and Cooke “played a single hand of poker. Cooke said Powell [the lawyer] had a chance of winning. ‘How about if we play 1,000 hands?’ ‘You’re dead,’ Cooke said.”¹⁸ The defendant utilized an employee of the Alcohol Law Enforcement agency who testified he played poker for more than 39 years.

On July 1, 2005, the judge issued a seven-page order. More than half of the findings of fact summarized the plaintiff’s expert witness testimony, especially that of Roy Cooke. For example, the court cited Cooke’s testimony that

7. . . . when a player is successful in engaging his opponents in situations that are mathematically favorable he will create positive expectations for the long run and although he will not win every hand, he will win more chips over the course of time.
8. Mr. Cooke testified that he spent years developing control of his own mannerisms so as to not give away his hand or strategy and so he could give false reads to other players.
9. Mr. Cooke testified that in poker a large percentage of the hands do not get to the showdown where the cards are compared. Many of the hands are folded prior to the showing of the cards.¹⁹

The order summarized the single defense expert testimony almost derisively:

20. He said that he enjoys poker and agreed that there was skill involved in

poker, but he believes that luck prevails every time. He testified that he had seen a television poker tournament in which there was a hand that had a 91 percent chance to win and yet it lost to a hand with only a 9 percent chance to win. He opined that this was absolute proof that in poker, luck predominates over skill. The defendant offered no other witnesses.²⁰

The court opined that it

21. . . . could not determine the meaning of the term “predominates” and therefore the court cannot apply the proper standard to determine whether poker is predominately a game of skill or predominately a game of chance.
22. That this court is not the proper forum in which this issue should be decided.²¹

The court concluded that the matter should be resolved by the Legislature and that the court “is satisfied after reviewing North Carolina case law, that card games similar to poker where hands are dealt face down and the participants cannot control which cards they receive are games of chance. This Court therefore determines that under North Carolina law poker is a game of chance.”²²

A newspaper reporter quoted the judge in the case as stating orally that the “statute dated from the 19th century and might be antiquated. ‘The culture is different now. . . . Society is dif-

¹⁷ *Id.*

¹⁸ Benjamin Niolet, *Chance still rules poker, judge finds; Club sought to open card parlor in Durham*, NEWS & OBSERVER (Raleigh, N.C.), May 24, 2005, at B1. “Besides Cooke, the judge heard from a poker tournament organizer from Florida, a casino operations vice president from the Bahamas and a Morrisville chemist who studies the game.” *Id.*

¹⁹ *Joker Club, LLC v. District Attorney*, No. 4 CVS 6034 (N.C. Super. Ct. July 1, 2005) (Order determining that poker is a game of chance under North Carolina law) at 3.

²⁰ *Id.* at 5.

²¹ *Id.* at 5–6.

²² *Id.* at 6.

ferent. The law is ambiguous in a number of different ways."²³ The judge also stated the skill/chance determination is unclear: "How do you measure that?"²⁴ the judge asked. "If the legislature told us what they had in mind, I'd understand. But they didn't tell us what it means."²⁵ The judge, however, concluded that "he was bound to follow the law as it was written."²⁶

The matter is now on appeal. By the end of March 2006, all briefs were filed with the Appellate Court, and on Aug. 23, 2006, the Court of Appeals heard oral argument.²⁷

Within the United States, caselaw is unclear as to whether skill in poker predominates over chance. The recently passed Unlawful Internet Gambling Enforcement Act²⁸ probably did not expand prohibited gambling, but there was no carve-out for games where skill predominated over chance. The original Goodlatte bill attempted to amend the Wire Act as follows:

(6) The term "bets or wagers"—

(A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a *game predominately subject to chance*, upon an agreement or understanding that the person or another person will receive something of greater value than the amount staked or risked in the vent of a certain outcome[.]²⁹

Bruce G. Ohr, chief of the organized crime and racketeering section in the DOJ's criminal division, testified before a Congressional subcommittee on Apr. 5, 2006, that DOJ had concerns with some of the Goodlatte bill definitions and stated: "For example, since the definition of the term 'bet or wager' requires that the activity be 'predominately subject to chance,' we are concerned whether this definition is sufficient to cover card games, such as poker."³⁰

While the Goodlatte bill language was not in the final bill adopted by Congress, it does indicate, however, that the Department of Justice may be aware of the distinction between games of skill and games of chance and it may also explain why there has been minimal federal interest in interactive poker. Nevertheless, the

largest online publicly traded poker operators, 888.Holding plc. and Partygaming plc., have decided to ban U.S. customers. Privately held poker operators such as PokerStars continue to accept U.S. customers.³¹ In the newly-elected 110th Congress, Rep. Barney Frank (D-Mass.) introduced a bill (H.R. 2046) that would legalize and regulate online gambling.

On the state level, many if not most, cases discussed whether poker should be distinguished from a lottery. The Supreme Court of Rhode Island opined that proposed casino gambling would violate the Rhode Island constitutional prohibition of lotteries.³² The court did admit that poker that would be operated at a casino, like blackjack, had some degree of skill, but since chance was "the predominant factor", it was a form of lottery and therefore prohibited.

A recent federal appellate court, interpreting New York law, concluded that poker was prohibited because the outcome depended "in a material degree on chance."³³

Other courts have concluded that poker is not a prohibited lottery because of the skill involved.³⁴ Several state statutes have included

²³ John Stevenson, *Judge lays cards on table, forbids poker; Ruling that it's a game of chance precludes opening of betting club*, HERALD-SUN (Durham, N.C.), May 24, 2005, at A1 (quoting N.C. Super. Ct. Judge Orlando Hudson).

²⁴ *Id.*

²⁵ *Id.*

²⁶ "Judge lays cards on table, forbids poker; Ruling that it's a game of chance precludes opening of betting club," *The Herald-Sun*, May 24, 2005.

²⁷ *Joker Club, LLC v. District Attorney*, No. COA06-123 (N.C. Ct. App.). On May 1, the court affirmed the district court decision, 2007 N.C. App. LEXIS 838.

²⁸ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (introduced by Rep. Robert Goodlatte, R-Va.).

²⁹ Internet Gambling Protection Act, H.R. 4777, 109th Cong. § 2(2006) (emphasis added).

³⁰ Hearing on H.R. 4777, The "Internet Gambling Prohibition Act, 109th Cong. (Apr. 5, 2006) (statement of Bruce G. Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, DOJ).

³¹ "Poker Stars' stars still shine," *Globes Online*, Oct. 19, 2006.

³² *In Re Advisory Opinion of the Governor (Casino)*, 856 A.2d 320 (R.I. 2004).

³³ *United States v. Gotti*, 459 F.3d 296, 342 (2d Cir. 2006) (discussing joker-poker machines).

³⁴ *Gallatin County v. D & R Music & Vending, Inc.*, 208 Mont. 138 (1984); *State v. Barnett*, 488 P.2d 255 (Wash. 1971).

poker as a game of chance, e.g., Maine, New Mexico, and Ohio.³⁵ Recent opinions of attorneys general generally have concluded that poker is a game where chance predominates over skill.³⁶ In a classic example of doublespeak, the attorney general of Massachusetts stated if chance in poker predominates over skill, then it is prohibited. "Massachusetts appellate courts have not been called upon to determine whether traditional forms of poker are considered games of chance rather than skill."³⁷

U.S. courts are more inclined to find poker as a game of skill if it is a live tournament rather than video poker.³⁸ Moreover, many poker experts consider Texas Hold 'Em to be the most challenging poker game. "[I]n the opinion of some experts, Texas Hold'em would add an additional layer of strategy or skill to the ordinary poker game."³⁹

In one unusual situation, an entrepreneur is attempting to convince Nevada gaming regulators that poker tournaments are sporting events. Specifically, the entrepreneur requested regulators to find that "derivative wagering on poker tournaments was distinguishable from individual poker games, and, that given that distinction, pari-mutuel wagering on such events is consistent with a waiver under NGC Reg. 22.120(1)(e)."⁴⁰ On July 27, 2006, at a hearing before the Nevada Gaming Commission, an attorney for the entrepreneur stressed:

However, there isn't anything more timely and popular in today's world than poker, and tournament poker in particular. If there is a betting methodology or strategy that can increase the interest of this type of game within the legal context of its operation in the state or Nevada, then it becomes a public policy issue as to whether or not you should hear something that pertains to expanding that type of capability.⁴¹

One gaming commissioner expressed concern:

Some of the issues that concern me are issues that even we're facing now, and it has to do with the integrity of poker, the in-

tegrity of gaming in Nevada. We have the issue of the dot com versus the dot net issue, how does that factor into this pari-mutuel, to what extent is a poker tournament outside the parameters of what is allowed and sponsored by those that we have some control or some relationship with, whether it is criminal or not criminal.⁴²

The matter was continued to allow further study by the Board and the Attorney General's Office.

UNITED KINGDOM

London, England

In London, there are about 26 poker clubs that presently have been declared to have violated British gambling law as a result of a Crown Court jury decision, *R. v. Derek Kelly* (Gutshot), on Jan. 16, 2007.⁴³

The relevant statute, the Gaming Act of 1968, had been interpreted not to prohibit games of skill such as chess or bridge,⁴⁴ but did prohibit

³⁵ 17 ME. REV. STAT. ANN. § 330 (2001); N.M. STAT. 15.4.9.9 (2004); OHIO REV. CODE § 2915.01 (D) (2003). See Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics and the Future of an American Tradition*, 22 T. M. COOLEY L. REV. 443 (2005).

³⁶ 91 Md. Op. Atty. Gen. 64 (Mar. 2, 2006); 2004 WL 235411 (South Carolina A.G., Jan. 22, 2004); Tenn. Op. Att. Gen. No. 05-159 (Oct. 14, 2005); Texas Att. Gen. Op. GAO 335 (June 20, 2005); but see Ark. Op. Att. Gen. No. 2005-034 (Mar. 9, 2005), which concluded that whether poker is a game of chance or skill should be decided by the trier of fact.

³⁷ Massachusetts A.G. opinion (June 30, 2005).

³⁸ *Gallatin County*, 208 Mont. 138.

³⁹ Anthony Cabot & Louie Csoka, *Cross-Border Issues in Gaming*, 4 NEV. L.J. 197, 219 (2003).

⁴⁰ Letter from Louis V. Csoka to Mark A. Clayton, member, State Gaming Control Board (Nev.), Aug. 9, 2005 (on file with author Joseph M. Kelly). The authors wish to thank Louis Csoka for providing material.

⁴¹ Transcript, Nevada Gaming Commission, July 27, 2006, at 117.

⁴² *Id.* at 136, remarks of Commissioner Siller.

⁴³ *R. v. Derek Kelly* (Gutshot), [Jan. 16, 2007], Crown Court, T20060579.

⁴⁴ Howard Swains & Adam Fresco, *Chips are down as poker clubs await court ruling*, TIMES (London), Oct. 26, 2005, at 30.

games of chance such as roulette and blackjack, which may be played legally only in Great Britain's approximately 165 casinos. U.S. judicial decisions had often concluded that there was an "English Rule" and an "American Rule" concerning the role of chance in defining a lottery. Under the American Rule, chance had to predominate over skill in order to establish a prohibited lottery. As a U.S. court opined, "Under the English Rule, only a scheme that exhibits or involves 'pure chance' is a lottery. 34 *Am. Jur. Lotteries* § 6 (1941). As a result, a scheme involving any skill, no matter how de minimis, will not be classified as a lottery."⁴⁵

English courts interpret the "skill" requirement differently concerning card game wagering. In *R. v. Thompson*, the court interpreted the Gaming Act of 1845 and card games. The court overturned a lower court bench decision that poker and bridge were prohibited wagering as a matter of law. Instead, the appellate court concluded that it was up to the jury to determine whether these games were "mere skill." The court rejected applying the "predominate" test to poker and instead concluded that "the proper question for a jury, when dealing with a game of cards, is: Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game or mere skill."⁴⁶

Derek Kelly, however, was prosecuted under the Gaming Act of 1968, which had barely mentioned card games. Specifically, Derek Kelly was accused of a violation of Gaming Act of 1968 §§ 3 (no charge for taking part in gaming), 4 (no levy on stakes or winnings), and 8 (all participating in the organization and management have committed an offense). At first glance, the Gaming Act language did not seem helpful to the defendant. In § 52(1), a game of chance was defined as one that "does not include any athletic game or sport, but, with that exception, and subject to subsection (6) of this section, includes a game of chance and skill combined and a pretended game of chance or of chance and skill combined."⁴⁷ Section 52(6) states, "In determining for the purposes of this Act whether a game, which is played otherwise than against one or more players, is a game of chance and skill combined, the possibility of superlative skill eliminating the element of chance

shall be disregarded."⁴⁸ Thus, when game of chance, § 52(1), is read with § 52(6), it would seem that a game played against other players may not be a prohibited game. Thus, Texas Hold 'Em would not be prohibited, but blackjack and Caribbean Stud poker (where players play against the house) would be prohibited gaming.

The Gambling Act of 2005 has statutory language that seems to close the loopholes that were legally available to Gutshot. Section 6(2) defines a game of chance as one that

- (a) includes—(i) a game that involves an element of chance and an element of skill,
- (ii) a game that involves an element of chance that can be eliminated by superlative skill, and (iii) a game that is presented as involving an element of chance, but (b) does not include a sport.

Thus, gaming that involves "an element of chance that can be eliminated by superlative skill" does not have the exception where a player played against other players.

In early 2004, Derek Kelly had set up two legal entities in London in order to comply with the law concerning poker and with the exemption in § 40 of the 1968 Gaming Act. Gutshot Limited owns a bar, restaurant, Internet café, and an online card room.⁴⁹ Gutshot Private Members Club, a nonprofit organization now consisting of about 25,000 members, pays rent to Gutshot Limited for use of its premises for poker tournaments. All monies from profits/service charges would eventually be returned to its members. Thus, Gutshot has asserted it makes no profit from gambling.

Its owner, Derek Kelly, has claimed: "Poker is a game dominated by skill. . . . Provided you are more able, ultimately you will be the winner. Like any game or sport, there are elements of luck. However, the more skillful player will

⁴⁵ Opinion of the Justices No. 373, 795 So. 2d 630, 635 (Ala. 2001).

⁴⁶ *Rex v. Thompson*, [1943] KB 650, 661.

⁴⁷ Emphasis added.

⁴⁸ Emphasis added.

⁴⁹ Its Web site states it has 12 million hits a month and has a staff of more than 50. Gutshot.com, Speech of Derek Kelly at International Gaming Conference and Expo, Nov. 7, 2006, <<http://www.gutshot.com/e/article>>.

win out in the end.”⁵⁰ Gutshot has been hosting poker tournaments since early 2004. According to Kelly,

I think the Gambling Commission will have great difficulty in finding anyone who will take the stand to say that poker is not a game of skill. . . . In any case, I don't think there is a single game that is purely about skill. Take chess, it comes down to skill but to start a game, you have to toss to decide who starts, so even then there is an element of gambling. How do you decide whether a game is say 43 per cent skill or 60 percent?

The director of operations for the Gambling Commission has determined to crack down on poker:

Poker has become increasingly popular in the past 12 months and people are seeking to cash in on the demand to play. The problem with pub tournaments is that they are unregulated. In a casino you have to give your name and address and the whole thing is monitored. In a pub, people may get in over their heads, start playing for very high stakes and be exploited by far more experienced players. This is about protecting people.⁵¹

In July 2006, the Gambling Commission issued guidelines on gaming on alcohol-licensed premises. In order to be covered by the “club” exemption, a member’s club must follow strict criteria.

- The genuine establishment of a bona fide club for the purposes of other than gaming;
- A club membership of 25 or more. . . . ;
- Bona fide fees;
- No public access;
- No other charges to engage in gaming beyond those currently set by the section (60p per day); and
- No rake or levy on stakes.⁵²

In November 2006, the government proposed that poker, with a capped player loss of £10 per

evening, be permitted at pubs without any necessity of a license.⁵³

The Metropolitan Police Club and Vice Unit, after a year-long investigation, filed charges in September 2005 against Derek Kelly for breaches of the Gaming Act of 1968. Its spokesman stated:

There seems to be a prima facie case of breaches of the Gaming Act, but there’s no test case. . . . The Gaming Act is a book as wide as Wales but there are a couple of specific offences. It’s a very unusual police case in that the defendants and the police are saying exactly the same thing is happening. We’re saying “You did this,” and they’re saying “Yes we did. But we don’t think we’re doing anything wrong.”⁵⁴

The specific statute concerning the alleged violations are Gaming Act of 1968 §§ 3(1), 4, and 8(1).⁵⁵ The charges were brought against Derek Kelly, and the matter was tried at the Snaresbrook Crown Court⁵⁶ from Jan. 9 to Jan. 16, 2007.⁵⁷

At the trial the defense attorney implied that the prosecution was unfair since it had been influenced by other interested parties, including a casino. The Crown Prosecutor utilized a police officer, a gaming board (Commission) employee, and a casino executive as expert witnesses. The defense relied on Professor Joseph M. Kelly, who was the only witness giving testimony on Jan. 12, and on Nic Szeremeta, editor of *Poker Europa*, and on the defendant Derek Kelly. During the trial, the prosecutor tried to

⁵⁰ Howard Swains & Adam Fresco, *supra* note 44.

⁵¹ Maxine Frith, *Is poker a game of skill or chance? One pub landlord bets his freedom on skill*, INDEPENDENT (London), July 10, 2006, at 16.

⁵² Julian Harris, *Poker and the Law: Commission Steps In*, iGAMING BUSINESS, Sept./Oct. 2006, at 21.

⁵³ Simon Bowers, *Government considers allowing poker in pubs*, GUARDIAN UNLIMITED (United Kingdom), Nov. 17, 2006, n.p.

⁵⁴ Howard Swains & Adam Fresco, *supra* note 44.

⁵⁵ Gutshot.com, *The Legal Fight – Have Your Say*, <<http://www.gutshot.com/e/legal/index.php>> (last visited Apr. 6, 2007).

⁵⁶ URN 25E 54405.

⁵⁷ Telephone interview with Derek Kelly, Chairman, Gutshot Private Members Club, Nov. 11, 2005.

get the defendant's experts to admit that poker was 70 percent skill, while the defendant stressed it was at least 70 percent skill.

At the trial, barrister Zeeshan Dhar, on behalf of Derek Kelly, briefly stated the relevant law:

The 1968 Act defines "gaming" as "the playing of a game of chance for winnings in money or money's worth." The 1968 Act further defines "games of chance" as "not including any athletic game or sport, but, with that exception, and subject to subsection (6) of this section, *includes a game of chance and skill combined.*"

The defense stressed that whether playing any game, including Texas Hold 'Em, amounts to gaming within the meaning of the 1968 Act depends on whether it is a game of chance. At first glance the Act seems to define the crucial phrase *games of chance* as including any game containing a mixture of skill and chance in any proportion.

During legal submission in the absence of the jury, the defense for Derek Kelly argued that the Act appeared to label all games as games of chance if the phrase *includes a game of chance and skill combined* was to be read as including *all* games of mixed chance and skill without regard to the proportions of each within the game. This consequence, it was argued, was due to the fact that all games fall into one of two categories: 1.) pure chance, and 2.) a mixture of chance and skill. The defense argued that interpreting the act in this fashion would lead to an absurdity as all games that are conventionally regarded as games of skill would be deemed games of chance.

Furthermore, the defense submitted that as the Act did not state that a game of chance includes *all, every, or any* game of chance, it was open to the jury to conclude that even though poker required a significant or not insignificant element of chance, owing to the overriding amount of skill involved in playing, it could not properly be called a game of chance.

Lastly, the defense submitted that, given that common sense called for an assessment of both the level of skill and chance involved in the game, it would entirely appropriate and prac-

tical to apply the American "predominance" test in determining whether Texas Hold 'Em was a game of chance or skill. The test was approved by the Supreme Court of California in the case of *In re Allen*.⁵⁸ In simple terms, where skill predominates chance, the game in question is deemed a game of skill and the converse where chance predominates skill.

The trial judge accepted that some gloss ought to be added to the wording of the statute to avoid it resulting in absurdity. Since, under the Act, even chess, by virtue of the minute advantage that the player who moves first has over the other, has an element of chance involved and would therefore be deemed a *game of chance* under the Act.

However, in his direction to the jury, the trial judge advised them that provided they were satisfied that playing Texas Hold 'em involved a "significant" element of chance that was more than "token and infinitesimal", the game satisfied the requirement of the 1968 Act. The jury was not directed to focus on the element of skill involved in Texas Hold 'Em but merely the element of chance. Furthermore, the trial judge did not direct the jury to apply the predominance test in considering whether Texas Hold 'Em was a game of chance.

As a result of the legal direction to the jury, the element of skill in the game was effectively deemed irrelevant. Derek Kelly's defense argued that it was not the intention of the 1968 Act to disregard the element of skill in relation to games of equal chance played between players as the requirement to disregard "superlative skill eliminating chance" in subsection (6) was only applicable to games played as between a player and the bank and not those played between players.

On Mar. 29, 2007, Derek Kelly was fined £10,000 (payable at £500 per month). The case is currently being appealed on the grounds of the trial judge's direction to the jury.

In the *Kelly* case, the outcome would likely have been very different had the predominance test, or, any other test that required an assessment of the level of skill to be made, been applied to determining whether Texas Hold 'Em

⁵⁸ *In re Allen*, 59 Cal. 2d 5, 27 Cal. Rept. 168 (1962).

is a game of chance. Applying the predominance test on the evidence before the jury in *Kelly*, it is likely that it would have concluded that skill predominated chance in Texas Hold 'Em and therefore playing the game did not constitute gaming under the Act.

Under United Kingdom caselaw, there are no precedents interpreting the phrase "game of chance" within the meaning of the Gaming Act 1968. The decision of the Court of Appeal in *Rex v. Tompson* [1943] related to the Gaming Act 1845, which prohibited all "card games" unless such games were games of "mere" or "pure" skill.⁵⁹

Under the 1845 Act, unless one could show that a game involved no chance whatsoever, playing the game constituted gaming under the Act. The 1845 Act was clearly designed to prohibit all card games. One would struggle to think of any card game that was one of pure skill. Indeed games such as Bridge or whist, whilst predominately skill based games, would fall foul of the old Act as they involve chance by virtue of the random distribution of cards. Arguably, games such as Bridge would, by virtue of the trial judge's direction in *Kelly*, would also be deemed games of chance under the 1968 Act as the random distribution of cards in bridge introduces a *significant* element of chance into the game.

Under the new Gambling Act 2005, which comes fully into force on Sept. 1, 2007, a game of chance is to include "a game that involves both an element of chance and an element of skill".

As under the Gaming Act 1968, a literal application of the definition of *game of chance* under the Gambling Act 2005 has the same if not greater potential for absurdity. Arguably, under the new Act, the requirement that a game have merely an *element of chance* in order to be branded a game of chance, gives rise to greater absurdity than under the previous Act. Under the new Act, it would be easier to argue that chess is a game of chance as the entitlement to the first move introduces an *element of chance* as opposed to a *significant element of chance* into the game.

It is likely that even under the new Act with its stricter wording, any jury confronted with the question of whether a game is one of chance or skill will still require direction on the inter-

pretation of the provision. If *Kelly* were to be followed, a trial judge would advise the jury that a *significant element of chance* needs to be present prior to any conclusion that the game is one of chance.

It is significant to note that, the new Act like the old, does not state that a game of chance includes *every, any or all* games that involve an element of chance and an element of skill. Accordingly, lawyers will still be able to invite the judge to direct the jury that even if they conclude that the game in question contains an element of chance, they are still entitled to conclude that overall the game is not one of chance.

The success of those arguments will depend on any decision of the court of appeal in *Kelly*. Until then the matter remains unresolved. However, at least in the United Kingdom, the lawyers are not so troubled by the question of whether *in fact* Texas Hold 'Em is a game of skill or chance, but rather whether it is one or the other in the eyes of the law.

Notwithstanding the complexity of the legal issues, the jury took barely an hour to conclude that Derek Kelly was guilty. Subsequently, the Gambling Commission, on Jan. 25, 2007, issued new proposals for gaming (poker) in clubs and taverns.

Permitting very low stakes gaming—in pubs, no more than £5 per person per game—will also help to keep gambling in the open and above board, making it easier to enforce controls and reducing the risk of exploitation.

Under these proposals alcohol-licensed premises would be limited to a maximum stake of £5 per person per game for equal chance games like poker and cribbage. Daily and weekly limits on stakes and prizes for games of poker played in individual premises would also be set at £100 and £500 respectively to ensure that poker in pubs remains a low-stakes low-scale activity.

Clubs would, for the first time, be limited to £10 per person per game for games of

⁵⁹ *Rex v. Tompson*, [1943] KB 650.

poker. Individual clubs would also be a set a maximum daily limit on the total amount of stakes or prizes of £200 and a weekly maximum of £1000.⁶⁰

Unlike land-based poker, should the poker operator be located offshore and online, he could accept British players legally as long as all activity remained offshore, i.e., no newspaper advertising within Britain.⁶¹

Northern Ireland

Northern Ireland is not included in the Gaming Act of 1968, which legalized casino gambling. Instead, the relevant statute is The Betting, Gaming, Lotteries, and Amusements (NI) Order 1985.⁶² In 2004, Sean Murphy opened the Cavendish Club in Belfast primarily for poker games. He had met with police, who assured him they would let him know if there were legal problems. It is undisputed that the players were often businessmen, physicians, and lawyers.⁶³

On Jan. 28, 2006, about 40 police raided the club, seized £23,000 as well as equipment, and detained the approximate 80 players who were playing in a poker tournament. Subsequently, the magistrate's court ordered the monies be returned to Murphy for distribution to the players and most of the seized equipment was also returned, although damaged.⁶⁴ On Feb. 8, 2007, the magistrate ordered Murphy to pay £3,000 and that £2,000 seized by the police be given to the Northern Irish Hospice Charity. Seized slot machines were ordered to be disposed of, but roulette and blackjack tables were returned to Murphy with the understanding they would be used only for legal purposes.⁶⁵

FRANCE

Only games of chance are covered by the prohibition Act n°83-620 of July 12, 1983. The French Supreme Court⁶⁶ has decided that poker is a game of chance when played for money. It is prohibited to organize this game without an administrative authorization, even if public access to poker rooms is restricted. Under the June 30, 1923 law and the July 15, 1947⁶⁷ Act, poker games may only be held in a private

"gaming circle" that obtained an authorization from the Home Affairs ministry. However, a new provision allows casinos to hold poker games and to organize international poker tournaments.⁶⁸ The 1959 Act that governs casino games is being amended to include stud poker. The sanctions contained in the Law of July 12, 1983, are heavy. Infringements to this law are punished with three years of prison and fines of EUR 45,000. Those sanctions are increased to seven years of prison and to fines of EUR 100,000 when infringements are committed in organized group.⁶⁹ Two main criteria, also used for other games of chance, are used by the courts to determine the limits of the 1983 Law: the mathematical criterion and the criterion of social risk for players.

Games of chance are those where chance alone decides and where the physical or intellectual capacities of the player do not intervene. Equally there is no ambiguity about games where chance does not play any role (chess for example). In this case, even if it is played for money, the French legal doctrine⁷⁰

⁶⁰ Press Release, Department for Culture Media and Sport, Consultation launched on gaming in clubs and pubs (n.d.), <http://www.culture.gov.uk/Reference_library/Press_notices/archive_2007/dcms011_07.htm> (last visited Apr. 6, 2007).

⁶¹ Gambling Commission, Frequently Asked Questions, <<http://www.gamblingcommission.com>> ("Can I Run an Online Poker Site? Yes, but the server and any facilities for processing the transactions must be based abroad.").

⁶² The Northern Ireland statute contains a virtually identical definition of a game of chance to that of the Gaming Act of 1968.

⁶³ Deborah McAleese, *Police Raid Poker Game in Private Members' Club*, BELFAST TELEGRAPH, Jan. 30, 2006; *Poker Players to Get Seized Cash*, BBC News, Jan. 31, 2006.

⁶⁴ The Cavendish, News Update, Aug. 1, 2006, <<http://www.thecavendishclub.com>>.

⁶⁵ *Club Owner Fined £3,000*, IRISH NEWS, Feb. 8, 2007, at 5.

⁶⁶ Cass. crim., 20 avr. 1945, S. 1945, 1, p.126.

⁶⁷ Arrêté du 15 juillet 1947 instruction sur la réglementation des jeux dans les cercles texte partiellement ABROGE: ART. 33 Publié(e) au Journal officiel "Lois et Décrets" du 19 juillet 1947.

⁶⁸ Act (décret) n°2006-1595 du 13 décembre 2006 modifiant the Act (décret) n°59-1489 du 22 décembre 1959 et relatif aux casinos.

⁶⁹ The *advertising* of an unauthorized game of chance is also punished by the rules governing criminal complicity.

⁷⁰ D. Veaux, S. Durand, *Contrats en matière de jeux.-jeux d'argent, JurisClasseur Contrats - Distribution Fasc. 3320, spéc. n°11.*

deems that this game is not a game of chance. Poker is a game that mixes chance and skill. In this type of situation the French Supreme court qualified games of chance, those where chance *prevails* over skill⁷¹. The principal criterion used by court is “mathematical”. This criterion determines if chance or skill precedes, in a mathematical way. That supposes a thorough examination of the rules of the game and an analysis of the theory of probability. If it is demonstrated before a court that for poker, skill prevails over chance, the court could conclude that it is a first step to exclude poker from the field of the law governing games of chance, and avoid its sanctions.

The criterion of the social risk for the player is a second criterion to assess in order to determine whether, in a game, skill prevails over chance. The existence of a stake is central in this second criterion. It takes into account the social consequences of the game and the losses for the players. The relevant caselaw of Nov. 8, 1956⁷² qualified a special game, where chance does not prevail over skill, as a game of chance because it involved “considerable stakes”⁷³ in a usual way. The legal French doctrine⁷⁴ deems that a game where the *stake is very low* and only practiced as a simple distraction is not a game of chance. If the stakes are low, there are no negative social consequences for the players. On the other hand, if stakes are high, the game becomes a game of chance.⁷⁵

A French court, on Mar. 15, 2007, concluded Patrick Partouche, chair of French Group Partouche, had violated French law because of its involvement with an online poker site that accepted French players. Partouche received a one-year suspended prison sentence and a EUR 40,000 fine (US\$53,000). According to his lawyer, Partouche had two grounds for appeal. First, CasinoPartouche.com was a free play site and was linked to a play-to-pay site. Second, the Web site was more about Hold ‘Em poker, which should be qualified as a skill game, therefore legal in France. “Also the French legislation regarding casino style games and poker does not explicitly prohibit the online games.”⁷⁶

OTHER JURISDICTIONS

Australia

The law is also unclear in Australian states. In South Australia, more than 60 poker players out of over 100 arrested refused to pay fines when arrested for participating in an alleged illegal poker game in June 2005. Lawyers representing 62 men appeared in Adelaide Magistrate Court on Sept. 28, 2006, facing charges “including being an occupier of a place used for unlawful gaming, being guilty of unlawful gaming and attending an unlawful game.” One lawyer representing 27 of the defendants arrested said: “There is a judgment from 1998 where, after hearing from mathematicians and various experts a magistrate found that poker was not a game of chance and ruled a defendant was not guilty.”⁷⁷ The magistrate suggested that the trial could be as early as February 2007. “There seems to be much understanding between the parties . . . when that turns into a reality, we will set the first matter down for trial.”⁷⁸

In perhaps the most bizarre poker situation,

⁷¹ First case of the French Supreme Court: Cass. Crim., Jan. 5, 1877.

⁷² French Supreme Court (criminal section): Cass. Crim., Nov. 8, 1956: Bull. Crim., n°727.

⁷³ *Id.* The court explained:

Attendu que pour déclarer les demandeurs coupables d’avoir tenu une maison de jeux de hasard, l’arrêt attaqué énonce que, dans le débit de boissons géré par la femme Mounigan, *étaient habituellement pratiqués des jeux d’argent comportant une part de hasard*; que Formose, concubin de la tenancière, faisait office de banquier; que ces jeux se renouvelaient fréquemment, en particulier les jours de paie des dockers; *que les mises étaient relativement considérables* et que certains joueurs allaient jusqu’à perdre en une seule soirée, quarante ou cinquante mille francs. . . .

Id. [Emphasis added.]

⁷⁴ P. Decheix, *Jeux, Loteries et paris*, Jurisclasseur Pénal annexes, Fasc. 10, spéc. n°45.

⁷⁵ French Supreme Court (criminal section): Cass. Crim. Nov. 8, 1956: Bull. Crim., n°727.

⁷⁶ *Group Partouche to Appeal Ruling, Attorney Says*, INTERACTIVE GAMING NEWS, Mar. 20, 2007, <<http://www.igamingnews.com>>.

⁷⁷ Sean Fewster, *Poker accused raise stakes in legal fight*, ADVERTISER (Australia), Sept. 29, 2006, at 14.

⁷⁸ *Id.*

[h]undreds of Canberrans are crossing the border to Queanbeyan and Goulburn to play the increasingly trendy game of poker and tournament organizers are calling for the ACT Government to change its laws. The usually liberal ACT appears to be out of step as 1964 legislation makes it illegal to play poker outside the Canberra Casino.⁷⁹

The games are free and each player receives 1,000 chips. Players can win prizes and a chance to enter the Sydney and the World Series of Poker in Las Vegas.⁸⁰

Canada

Canada has eliminated the skill/chance determination. In *Ross v. The Queen*,⁸¹ the Supreme Court of Canada had to determine whether a bridge club violated the law for charging a fee for playing bridge. The court stressed that Canada had not adopted the predominant factor test as to whether skill predominated over chance. "It seems clear that the Parliament of Canada sought to avoid the uncertainties involved in trying to ascertain the predominate factor in mixed games by enacting that they would be treated in the same way as games of pure chance."⁸² Most commentators have suggested that unlicensed poker games might be in violation of some part of the Canadian Criminal Code.⁸³

For example, Michael Lipton, an expert on Canadian gambling law, stated,

where people have been prosecuted and convicted of playing poker for stakes, the courts have used section 201 [the Canadian Criminal Code] (keeping or being found in a common gaming house), or section 202(1)(b) (keeping a device for gambling or betting). . . . Online poker is far more difficult to prosecute where the only thing physically located in Canada is one of the poker players, owing to the difficulty of applying the provisions used to prosecute 'regular' poker games, and the legal and practical difficulties of prosecuting persons not located within Canada.

Advertising of poker in Canada, however, "appears to be legal, due to a gap in the two provisions that deal specifically with advertising."⁸⁴ Predictably, "[t]here has been concern at the lack of government reaction to advertisements of online poker."⁸⁵

Despite the ambiguity as to the legality of online poker, PartyGaming, the largest online poker company, decided to move its servers to Gibraltar from Kahnawá:ke, where it had interactive gaming licenses from the First Nations. It had concluded:

The Directors have been advised that the extent of the Group's operations and presence in Canada may be sufficient for criminal or civil action to be taken against the Group, the Directors and for other persons and entities associated with PartyGaming's online game activities. If the prosecuting authorities in Canada regard the computers of PartyGaming's customers in Canada as "a device for gambling or betting" prosecutions could also be brought in Canada, under the Canadian Criminal Code against such customers.⁸⁶

Countries Beyond the United Kingdom

In Europe, outside the United Kingdom, the law concerning poker is unclear,⁸⁷ perhaps be-

⁷⁹ *Full House as Canberrans Cross Border for Game of Poker*, Canberra Times, May 30, 2006; *Pub League Founder Predicts Future*, A.P., Nov. 9, 2006.

⁸⁰ *Id.*

⁸¹ 70 D.L.R.(2d)606; [1968] SCR 786, 789. Canadian caselaw has interpreted sections of its Criminal Code to require for a violation that card games be pure chance. *R. v. Shabaquay* [2004] O.J. 2357. (Bingo is a game of mixed skill and chance.)

⁸² 70 D.L.R.(2d)606; [1968] SCR 786, 789.

⁸³ However, no Canadian court has held that online poker playing is either legal or illegal. *Legal odds on your side*, WINNIPEG SUN, July 10, 2005.

⁸⁴ Michael D. Lipton, Q.C., *Poker—A Canadian Perspective*, in INTERNET GAMBLING REPORT 637–40, 640 (9th ed. 2006).

⁸⁵ The advertisements are for "play" money. Keith McArthur, *Crackdown on net poker room ads urged*, GLOBE & MAIL (Canada), Aug. 11, 2005, at B3.

⁸⁶ PartyGaming Prospectus, June 14, 2005, at 52.

⁸⁷ For an excellent article on taxation issues, see Arne M llin Ottosen, *Taxation of Online Poker in Denmark*, 10 GAMING L. REV. 358–62 (2006) (concluding that poker winnings in a Gibraltar-licensed site were exempt from Danish taxation on winnings).

cause there are no government monopolies or powerful national interests concerning that issue. Similar to the United States, there have been bizarre results. In Romania, an Orthodox priest caught playing poker in a pub was fined US\$470 and could be defrocked for "activities incompatible with the service of a clergyman."⁸⁸

In Germany, poker "is still considered a game of chance" and only state-owned or licensed casinos "are officially authorized to organize games of chance."⁸⁹ The most recent German court decision on poker was in 1906.⁹⁰ "However, this decision did neither consider the *elements of skill* in certain versions of poker nor the *monetary value of the stakes* involved [emphasis in original]."⁹¹

In Russia, the sports minister classified poker tournaments as official sports competitions and not gambling.

In Austria, poker is considered a game of skill. Its acceptance is due largely to the efforts of Peter Zanoni who eventually obtained legal recognition for private card rooms.⁹²

In the Netherlands, the Concord Card Club case held that poker was a game of chance and not skill.⁹³

In Norway, poker is illegal, and regulators are now determining how to react to its growing popularity.

Sweden has licensed its state-owned company Svenska Spel to operate online poker. During a two-year experimental period, advertising would be permitted only on the Internet and in newspapers and the maximum wager set at US\$11,300.⁹⁴ Since its introduction in April 2006, 95,000 players have registered, wagering over SEK 2 billion (US\$280 million) in the first three months of operation. Svenska Spel has reported SEK 52 million (US\$7.2 million) during this period.⁹⁵ Ladbrokes has challenged the Swedish monopoly by applying for an e-poker license and "will consider legal action if the application is denied."⁹⁶

Within Ireland, the government has established a commission that will probably recommend the legalization and regulation of poker and other forms of gaming, including perhaps the Internet. Presently, there are members-only card clubs where a member may play poker as well as blackjack and roulette. The Gaming and Leisure Association of Ireland welcomes regula-

tion and already mandates that members take measures to know their players, minimize suspicious transactions, and minimize compulsive gambling by requiring members to share databases of self-excluded individuals.

In Israel, according to the Israeli Poker Association, a study by Professor Ehud Lehrer of the University of Tel Aviv convinced Israeli authorities to allow a poker championship tournament because poker "is unequivocally more dependent on knowledge, understanding and ability than luck."⁹⁷

CONCLUSION

Presently, there has been no judicial victory for poker players who had hoped that a court might conclude poker is a game that is exempt from gambling laws. It is possible that any of the cases in the UK, France, the United States, or Australia might ultimately decide poker is a legal game of skill. Until then, poker may be forced underground—much to the satisfaction of criminal elements. Meanwhile, respective governments lose much-needed tax revenue.

⁸⁸ *What in the Weird*, MXS, Jan. 18, 2006, at 8.

⁸⁹ Speech of Dr. Wulf Hambach, Can Europe Fuel the Next Online Poker Boom?, Speech at the World Poker Congress (Stockholm, June 28, 2006).

⁹⁰ RG JW 06, 789; Stuttgart ZStrW vol. 44(1924)(620).

⁹¹ Most of the information in the above paragraph is from a speech of Dr. Wulf Hambach, Can Europe Fuel the Next Online Poker Boom?, Speech at the World Poker Congress (Stockholm, June 28, 2006).

⁹² Michael Keiner, *The Current Legal Situation of Poker in Germany and Austria*, CARD PLAYER EUROPE, <<http://www.cardplayer.com/cpeurope/article/15976>> (last visited Apr. 6, 2007). Zanoni is now attempting to get poker recognized as an Olympic sport. *Id.*

⁹³ Concord Card Club case [Supreme Court of the Netherlands], 3 Mar. 1998, N.J. 1999, 59 (Neth). The author is indebted to Justin Franssen for information in this paragraph.

⁹⁴ Much of the information on Swedish internet poker is from Per Binde, *Report from Sweden: The First State-Owned Internet Poker Site*, 11 GAMING L. REV. 108–15 (2007); see also, *Swedish government approves online poker*, DEUTSCHE PRESSE-AGENTUR, Nov. 24, 2005.

⁹⁵ *Nambling Notes*, INTERACTIVE GAMING NEWS, Aug. 25, 2006, <<http://www.igamingnews.com>>.

⁹⁶ *Ladbrokes Applies for Swedish E. Poker License*, INTERACTIVE GAMING NEWS, Apr. 7, 2006, <<http://www.igamingnews.com>>.

⁹⁷ Dani Lotem, *Police Approved National Poker Championship*, POKER NEWS, Apr. 8, 2007, <<http://il.pokernews.com>>.