

Poker as a Game of Skill: Recent Cases

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Introduction

Generally, each of the elements of *prize*, *chance* and *consideration* must be present for an activity to be gambling. *Morrow v. State*, 511 P.2d 127 (Alaska, 1973). In traditional poker games there is no dispute that *prize* and *consideration* are present. Poker players have long believed that poker does not have the element of *chance*. They contend that it is a game of skill.

In most states, the determination of whether a game is one of *skill* or *chance* is based on the predominance test. The California Supreme Court said:

“The term 'game of chance' has an accepted meaning established by numerous adjudications. Although different language is used in some of the cases in defining the term, the definitions are substantially the same. It is the character of the game rather than a particular player's skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the *dominating factor* in determining the result of the game.”

In re Allen, 27 Cal.Rptr. 168 at 169, 59 Cal.2d 5 at 6(Cal., 1962) (*Emphasis supplied*). A listing of states that appear to follow the predominance test is set forth in the table at <http://www.gambling-law-us.com/State-Law-Summary/>.

As I said in a previous article, see: <http://www.gambling-law-us.com/Articles-Notes/online-poker-skill.htm>, no state court has ever specifically held that poker is a game of skill—until now!

In rapid order there have now been two cases that have specifically held poker is a game of skill under the predominance test and one case that impliedly so held.

Pennsylvania v. Dent

In *Pennsylvania v. Dent*, available online at

<http://pokerplayersalliance.org/headlines/2009/01/19/pa-judge-thomas-a-james-jr-opinion-on-commonwealth-of-pa-vs-walter-watkins/> the court ruled:

Using the predominance test, in conjunction with analyzing skill versus chance using the four prong dominant factor test, it is apparent that skill predominates over chance in Texas Hold'em poker. First, each player has a distinct possibility of exercising skill and has sufficient data available to make an informed judgment. Second, each player has the opportunity to exercise the skill, and they do possess the skill (albeit in varying degrees. Third, each player's skill and efforts sufficiently govern results. Fourth, the standard skill is known by the players and governs

the results. Skill comes with varying degrees of competence, but that is the case with any competition involving skill.

The academic studies and the experts generally agree that a player must be skillful to be successful at poker. At the outset, chance is equally distributed among the players. But the outcome is eventually determined by skill. Successful players must possess intellectual and psychological skills. They must know the rules and the mathematical odds. They must know how to read their opponents' tells and styles. They must know when to hold and fold and raise. They must know how to manage their money.

This court finds that Texas Hold'em poker is a game where skill predominates over chance. Thus, it is not 'unlawful gambling' under the Pennsylvania Crimes Code." *Id* at 13-14. [Footnotes and citations omitted.]

Colorado v. Raley

Raley started a bar poker league in Greeley in early 2008. Initially about 15 players showed up at a local bar to play in a poker tournament once a week or so. Each player paid \$20 to play and the league kept 10% of that to pay a player/dealer \$10 for his services in dealing in the game in which he was also a player. The rest of the money withheld was used to pay various league expenses. The balance of the player's buy-ins were awarded as prizes to the top finishers in the weekly tournament. Over the next few months the people who asked to join and were accepted into the league grew to over 100, although no more than 37 ever showed up on any given night.

Raley was charged with illegal gambling under Colo. Revised Statutes Sec. 18-10-103(1).

Gambling - professional gambling - offenses. (1) A person who engages in gambling commits a class 1 petty offense. (2) A person who engages in professional gambling commits a class 1 misdemeanor. If he is a repeating gambling offender, it is a class 5 felony.

Colorado Revised Statutes Sec. 18-10-102. *Definitions* provides:

As used in this article, unless the context otherwise requires:

(1) "Gain" means the direct realization of winnings; "profit" means any other realized or unrealized benefit, direct or indirect, including without limitation benefits from proprietorship, management, or unequal advantage in a series of transactions.

(2) "Gambling" means risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an

event, including a sporting event, over which the person taking a risk has no control, but does not include: (a) Bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries;

*** (d) Any game, wager, or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling; ***

The defense presented two threads in its case. First, that the members of the League had a bona fide social relationship because only an existing member could introduce people he knew to join the league. Second, the defense presented Professor Robert Hannum, a tenured professor of statistics and mathematics at the University of Denver, as an expert who was accepted as such and testified that in his expert opinion poker was a game of skill. Colorado case law has not determined whether the predominance test is followed. Professor Hannum presented testimony about one of his studies that showed the "skilled" player won 97% of the time in his simulation against an unskilled player who played at random. He also testified about other studies that reached similar conclusions.

The jury came back with a not guilty verdict. Since there were no special questions propounded to the jury, there is no way to know the grounds on which they based their decision.

The prosecution has given notice that it intends to appeal the trial judge's decision allowing Professor Hannum to testify on the game of skill issue. The prosecution asserts that the Colorado Supreme Court has ruled that games such as poker are games of chance, and thus it was error to admit evidence that it is a game of skill. In *Charmes v. Central City Opera House Association*, 773 P.2d 546 (Colo., 1989) the Colorado Supreme Court said:

The last element of the statutory definition of "gambling" is that the risking of a thing of value for gain be contingent *in whole or in part* upon lot, chance, or the happening of an event over which the person taking the risk has no control. *There is no dispute here over the fact that the card games and other games of chance at the Gala were contingent in whole or in part upon lot or chance or the happening or outcome of an event over which the person taking the risk had no control.* While poker and perhaps some of the wagering games might involve some skill, these games certainly are contingent "in part" upon chance, and when, as here, the games involve risking a thing of value for gain, they constitute a form of "gambling" in its commonly understood sense. See *Ginsberg v. Centennial Turf Club*, 126 Colo. 471, 477, 251 P.2d 926, 929 (1952) (the game of poker is not a lottery but is most certainly a form of gambling).

Id. at 551. (*Emphasis supplied.*)

The appeal in *Charmes* was from a declaratory judgment. The lower court held in favor of the charity, which wanted to hold a charitable fund-raising casino night party. The basic problems with the statements about *some chance* in *Charmes* is that the issue of skill versus chance was not litigated in that case and there is *some chance* in all endeavors, so a standard to determine the nature of a game needs to be adopted. An overwhelming majority of jurisdictions have adopted the predominance test perhaps for this very reason.

For example, on the obverse of that point, in *State ex rel. Tyson v. Ted's Game Enters.*, 893 So. 2d 376 (AL, 2004) a statute authorizing “bona fide coin-operated amusement machines” defined such machines as “every machine of any kind or character used by the public to provide amusement or entertainment ... the result of whose operation depends *in whole or in part* upon the skill of the player” The defendant argued that as long as its coin-operated amusement machines involved “some skill” in their operation, they met that qualification... The Alabama Supreme Court held:

...[Our constitution] forbids the Legislature from enacting a statute authorizing a lottery. Thus, we hold that [this statute] may not, without contravening [our constitution], be applied so as to legalize games or activities in which skill does not predominate over chance in determining the outcome.

Town of Mt. Pleasant v. Chimento

In this South Carolina case five defendants were charged with gambling under the South Carolina Code of Laws Sec. 16-19-40, which makes it a misdemeanor to play cards or dice in specified locations, including a “house used as a place of gaming.” These defendants asserted that gaming and gambling are synonymous and that it is generally recognized that the three elements necessary to find gambling are *prize*, *chance* and *consideration*. Extensive expert testimony was presented on the issue of poker as a game of *skill*.

The judge said “This Court...finds that Texas Hold-em is a game of skill. The evidence and studies are overwhelming that this is so. *Town of Mt. Pleasant v. Chimento*, Case No. 98045DB, Mt. Pleasant Municipal Court, South Carolina (rendered Feb. 19, 2009). (Available online at: <http://www.scribd.com/doc/12654899/SC-Judges-Decision-on-MtPleasant-Poker-Case-021909>)

The judge was not convinced, however, that the predominance test is the law in South Carolina. Therefore, he found “...[T]his Court will not set itself to definitively conclude that this State will or does follow the ‘Dominant Test’ Theory and thus is compelled, since it has no clear guideline from the Legislature or from the majority of the Supreme Court to find that defendants guilty of violating Code Section 16-19-40, and therefore are required to pay the fines and assessments required by such a violation.” The defendants have given notice of appeal in this case.