

Game Oiver: May One Bet on Games of Chance or Skill?

Adapted from the writings of Dayan Yitzhak Grossman

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Recently, at a highway rest stop in Pennsylvania, I encountered an arcade game displaying a prominent notice that the machine's payouts are determined primarily by skill, not luck. I realized that this must mean that Pennsylvania gambling law allows games of skill in a context in which it does not allow games of chance. It turns out that this is the subject of ongoing litigation. A couple of months ago, PlayPennsylvania reported:

The question of the legality of Pennsylvania skill games, which has dragged on for years, finally has some clarity. The Pennsylvania Commonwealth Court unanimously ruled that unregulated skill games within the state are legal games of skill...

The Commonwealth Court has made it clear that skill games will remain legal, despite the fact that the Pennsylvania Attorney General's office stated that the games are "clearly" slot machines. The court believes that the machines are games of skill and not chance.[1]

Halacha, too, distinguishes between games of chance and games of skill—but in precisely the opposite direction.

The Gemara cites a dispute about whether gambling is theft:

MISHNAH: And these are the ones ineligible to be judges or witnesses: One who plays with dice...and those who fly pigeons...

GEMARA: One who plays with dice—what does he do that disqualifies him? Rami bar Chama said: Because the wager is an *asmachta* (where A commits to pay B on the condition that x will occur, with the expectation that it won't; lit., "reliance"), and an *asmachta* is not binding (so when the winner of the bet later exacts payment from the loser, that is deemed theft).

Rav Sheishess said: Any agreement like this is not an *asmachta*.

Rather, dice players are disqualified because they are not involved with furthering the general welfare.[2]

The Gemara subsequently cites two opinions about the meaning of "those who fly pigeons," one of which is that it refers to people who gamble on pigeon racing, and it explains why the Mishnah needed to mention both dice players and pigeon racers:

The Mishnah teaches the ineligibility of one who relies on his own skill (the dice player), and it teaches the ineligibility of one who relies on the skill of his pigeon, telling us that both bets are considered *asmachta*. And it was necessary to teach both cases, for had it taught only the disqualification of one who relies on his own skill, I might have said that it is only there, in a game of dice, that the wager is considered an *asmachta*, because the dice player does not conclusively resolve to give the money, for he says: "I am sure of myself that I know how to play better than my opponent." But regarding one who relies on the skill of his pigeon, I would say that

since he has no reason to be confident of winning, the bet is not an *asmachta*. And if the Mishnah had taught only the disqualification of a person who relies on the skill of his pigeon, I would have said that only pigeon racing is an *asmachta*, because the pigeon racer says to himself, "The outcome depends on the banging of the clackers, and I know how to bang them better than my opponent." (Because he assumes he will win, he never intended to relinquish the money.) But regarding one who relies on his own skill (the dice player), I would say it's not an *asmachta* (because he isn't confident he'll win).

Therefore, the Mishnah had to give both examples.[3]

The latter point of the Gemara is clearly that games of skill are more problematic than games of chance, because the player has more confidence (or perhaps overconfidence) in his ability to win. The former point, however, is less clear: The Gemara may mean that there actually is an element of skill in the dice games in question, or alternatively, that even if there is objectively no such element, the player nevertheless may have an unreasonable confidence in his ability to influence the outcome merely by virtue of his more direct involvement in the game.

The Rambam classifies dice playing and animal racing to win money as theft:

The Chachamim forbade many things as theft, and one who violates them is a thief Rabbinically. For example, those who fly pigeons or play dice.

What is the case of dice players? These are people who play with pieces of wood, pebbles, bones, or the like and make a condition that whoever will best his friend in this game will take a certain amount of money from him. This is theft Rabbinically. Although he took the money with its owner's acquiescence, because he took his friend's money for nothing, in a manner of play and jest, he is stealing. Likewise, those who gamble with domesticated animals, wild animals, or birds and make a condition that whoever's animal will be victorious or run more than the other's will take from his friend a certain amount of money, and anything similar to these, all this is forbidden, and it is theft Rabbinically.[4]

The Shulchan Aruch codifies this position of the Rambam,[5] and various Sphardi authorities accordingly rule that gambling in general is strictly forbidden.[6] The Rama, however, rules leniently (in accordance with other Ashkenazi *Rishonim*), that gambling is not considered *asmachta* and is not prohibited.[7]

It would seem that even the Rama would only permit wagering on games of chance, not on games of skill. Rashi and his great-grandson R' Yitzchak ben Shmuel (the Ri Hazakein) explain the rationale of Rav Sheishess's view—that gambling is not prohibited as an *asmachta*—to be that *asmachta* only applies where the contracting party thinks that the fulfillment of the condition is within his ability, and he thus mistakenly assumes that the negative outcome will not occur. A gambler, however,

does not rely upon anything, because he does not know whether he

will win or not, and he stipulates regardless, so he evidently stipulates despite being uncertain of the outcome, and he commits himself to paying (if he loses), so this is not theft.[8]

The Rama's lenient ruling on gambling is explicitly predicated upon this distinction of Rashi and the Ri, so it would seem to follow that games of skill, where the players may very well be relying on their skill at the game, would indeed constitute *asmachta* and thus be prohibited.

The matter is not so simple, however. The position of Rashi, the Ri, and the Rama—that gambling is permitted because there is no room for overconfidence in one's personal abilities—must be reconciled with the Gemara's statements that a dice player might say that he is certain that he knows better than his opponent how to win, and that a pigeon racer might say that he knows better than his opponent how to speed up his bird with noise. Although these statements appear within the context of the assumption that gambling is prohibited as *asmachta*, it would seem to follow that as a matter of normative halacha, gambling is permitted even where elements of skill are involved, unless we assume that the view that permits gambling has a factual disagreement with the view that prohibits it and completely rejects the idea that any skill is involved in these games, and it rejects even the very possibility that players of these games might *think* that there is. But it is unclear how this is to be reconciled with the assertion that the gambler does not rely upon anything because he doesn't know whether or not he will win.

[1]Corey Sharp. What Legal Pennsylvania Skill Games Mean For Regulated Gambling Industry. Dec. 5, 2023.

<https://www.playpennsylvania.com/skill-games-legal-gambling-industry-impact/>.

[2]Sanhedrin 24b.

[3]Ibid. 25a-b.

[4]Hilchos Gzeilah Va'aveidah 6:7,10. Cf. Magid Mishneh ibid. 6:10-11; Kesef Mishneh ibid. 6:11; Rambam Hilchos Eidus 10:4; Lechem Mishneh ibid.; Tur C.M. siman 34; Bais Yosef ibid.; Bach ibid.; Taz ibid. se'if 16; Sma ibid. s.k. 40; Urim Vetumim ibid. Tumim s.k. 15; Shu"t Rav Pe'alim cheilek 2 Y.D. siman 30 s.v. Teshuvah; Shu"t Yabia Omer cheilek 7 C.M. siman 6 os 1 and cheilek 10 Y.D. siman 58 (to Rav Pe'alim ibid., os 23).

[5]Shulchan Aruch C.M. 370:1-3, and cf. 34:16.

[6]Rav Pe'alim ibid.; Shu"t Yaskil Avdi cheilek 8 O.C. siman 28 anaf 2 (and cf. ibid. Y.D. siman 5 anaf 3); Yabia Omer ibid.

[7]Hagahos Shulchan Aruch C.M. 207:13, and cf. ibid. 370:3.

Cf. Shu"t Ziknei Yehudah (this teshuvah was also published in Pachad Yitzchak (Lampronti) cheilek 3 os ches reish cheirem pp. 53b-55b; R' Chaim Jachter, Gray Matter (Vol. 1) pp. 125-132.

[8]Rashi ibid. 24b s.v. Kol ki hei; Tosfos ibid. s.v. Kol ki hei.