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Is Poker a Game of Chance? The Australian Position

Overview

The recent case of *Police v Jones, Police v Ravesi* [2008] SAMC 62 confirms that poker involves skill and is not merely a game of chance. Although the outcome of this case was dependent on the specific wording of the South Australian statute, it confirms the view taken by most Australian authorities that poker should be treated differently from other games when considering whether unlawful gambling has taken place.

Background

The matter came before the South Australian Magistrates Court as a result of charges brought that the conduct of, and participation by players in, a Texas Hold'em Poker tournament constitute unlawful gaming under the laws of South Australia. The tournament had been organised by the Australian Poker Association ("APA"), which allowed its members, and members of the public who registered as members of the APA prior to the commencement of the tournament upon payment of a membership fee, to participate in the tournament.

Each registrant was given chips having a face value of \$1,000 – upon payment of further monies in the first couple of hours, additional credits could be purchased. These monies were applied to the prize moneys for the tournament. There was no evidence that the APA made any profit from the conduct of the tournament.

The Law

“Unlawful gaming” is defined in section 4 of the South Australian Lotteries and Gaming Act (the “Act”) as:

- “(a) *the playing at or engaging in any game with cards or other instruments, or with money, in or as a result of which game any person or persons derives or is intended to derive (other than in his capacity as player) any part of percentage of any money or thing played for, staked, or wagered; and*
- “(b) *any contravention of or failure to observe any provision of this Act, whether that provision relates to unlawful gaming as hereinbefore defined or not.”*

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In order for unlawful gaming to be established, it was necessary to show that a game was played in contravention of or failure to observe any provision of the Act. In this case, the prosecution sought to prove that the relevant poker tournament was in breach of section 51 of the Act.

Section 51 of the Act states:

“Any person who in any public place at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of wagering or gaming:

- (a) plays at any game or pretended game of chance;*
- (b) bets by way of wagering or gaming on any game or pretended game of chance,*

shall be guilty of an offence.”

Decision

Expert evidence relating to the nature of poker and other games was given. In essence, the evidence accepted by the Court was similar to the evidence given in the Gutshot¹ case in the UK, namely that the game of Texas Hold'em Poker is a game where skill prevails and that it is not merely a game of chance. Further, the Court appeared to accept the expert evidence that, despite an element of chance existing in respect of the manner in which cards are dealt, skill was a determinant element in the outcome in the game over time.

This finding was sufficient to dispose of the case as the offence in section 51 could only be established if poker were found to be wholly a game of chance. As the Court held that this was not the case, neither the organiser or a player in the tournament could be found to have engaged in "unlawful gaming".

Commentary

This decision also commented on other types of games. Roulette and lotteries are likely to be considered wholly as games of chance, while other games, like bridge and backgammon are not.

Difficulty exists in applying these principles to laws existing in other jurisdictions, such as the Commonwealth of Australia (the Interactive Gambling Act 2001) and other Australian states and territories. In general terms, unlawful gambling is deemed to have taken place where:

- people participate in a game by making bets for value;
- the bets are made in anticipation of winning a prize; and
- the game is a game of chance and, in most states and territories (except for South Australia), a game of mixed skill and chance or a game which is deemed unlawful.

¹ R v Kelly (2008) 2All ER840

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Offences are committed by those persons who run the game for reward, allow their premises to be used for the conduct of a game and, in some states and territories, participate in the game.

As a result of the *Jones* case, it is probable that poker would not be considered as a game of chance. In some Australian jurisdictions², poker is deemed unlawful (principally because it is considered to be a game that should only be organised by, and played in, the locally licensed casino), while the Federal authorities consider, at least, that it is a game of mixed skill and chance.

To the writer's knowledge, save for the *Jones* case and the earlier South Australian Magistrates Court decision of *Police v Kobeck*, poker has not been the subject of recent judicial consideration in Australia as to whether it constitutes a game of mixed skill and chance. Certainly, if the principles in the *Jones* case were applied, it is probable that poker (and other games such as bridge, chess and possibly backgammon) would fall within the category of either a game of skill or a game of mixed skill and chance.

Despite this lack of clarity, Australian regulators have recognised the popularity of poker and a number of states have issued guidelines detailing the manner in which poker will be treated.

For example, the New South Wales Department has issued guidelines which recognises that poker tournaments can be played legally in NSW. The April 2008 version states:

- it is possible to charge an entry fee to participants in a poker tournament played in a club, but no money can be gambled on the outcome;
- poker chips without money value can be used; and
- prizes can be awarded to the winners of the tournament.

The guidelines, and similar guidelines (with some differences) issued by the regulatory authorities in other states/territories, have been a factor in enabling a poker boom to occur in Australia, with many pubs/clubs hosting poker nights/tournaments on a regular basis. This popularity is also evidenced by the upsurge in the broadcast of poker events, principally overseas events, and the staging of poker events at Australian casinos.

Notwithstanding this growth, there remains concern that certain poker events are being staged in a manner which does not fall within the relevant guidelines. Also, the attractiveness of poker has given rise to adverse comment by groups concerned about problem gambling issues.

It is probable that poker will continue to be subject to close attention by regulators and it is quite possible that steps will be taken to ensure that poker tournaments are staged only in accordance with guidelines published by the relevant regulatory authority.

Although the *Jones* decision is clear in stating that poker is not wholly a game of chance, it is less clear in giving guidance as to whether poker is a game of mixed chance and skill or a game of skill. However, it does suggest that an element of chance, for example, in the manner in which cards are dealt in a game, does not prevent a game from being a game of skill.

² For example, Northern Territory and Australian Capital Territory



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Although the UK authorities (the Gutshot case) and US authorities suggest that poker is a game where skill is a predominant factor in the outcome, a different test would be applied in most Australian jurisdictions. As a result, it is unclear whether an Australian Court would consider that the element of chance inherent in a game of poker is sufficient for it to be considered a game of mixed chance and skill and, in most Australian jurisdictions, an unlawful game.

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