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GAME OIVER: MAY ONE BET ON GAMES OF CHANCE OR SKILL?

Adapted from the writings of Dayan Yitzhak Grossman

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 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 Sheishesh said: Any agreement like this is not an *asmachta*. Rather, dice players are

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PARSHAS MISHPATIM

DOG MEAT

Excerpted and adapted from a shiur
by Rav Moshe Ze'ev Granek

Flesh in the field that has been torn you shall not eat; you shall throw it to the dog.

Shmos 22:30

Rashi explains that meat from a treifah (an animal forbidden to eat due to an injury or defect) is to be thrown to a dog, to teach that Hashem doesn't withhold reward from any living creature, because dogs fulfilled Hashem's command not to bark at Jews during *makas bechoros* in Mitzrayim (Shmos 11:7).

The Me'iri (Shabbos 19a) and the Divrei Emmess maintain that a treifah is to be given specifically to a dog. But the Darchei Teshuvah (Y.D. 29:2) quotes the Chikrei Leiv (Y.D. 1:19), who says that the accepted practice is to give meat from a treifah to a non-Jew. The Chikrei Leiv points out that *Amora'im* gave their treifos to non-Jews (see Chulin 94a).

The Magein Avraham (O.C. 498, as understood by Machatzis Hashekel 498:8) explains that

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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

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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.

Stop Sign

Q I'm filling out a legal form that concludes, "By signing below, I hereby swear that the information provided is true." May I sign this, either by hand or digitally via DocuSign?

A Many *psukim* and *ma'amarei* Chazal emphasize the extreme severity of a false *shvuah*. For this reason, swearing was eliminated from *bais din* procedure centuries ago. The Chasam Sofer (Teshuvos C.M. 90) strongly backs this custom and proves from many sources that it is forbidden to swear even truthfully, and that this must be avoided at all costs. See also *Minchas Yitzchak* (4:52), addressing a professional who was required to swear when

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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

⁴ Hilchos Czeilah Varoveidah 67:10. Cf. Magid Mishneh ibid. 610-11; Kessef Mishneh ibid. 611; Rambam Hilchos Eruvin 104; Lechem Mishneh ibid.; Tur C.M. siman 34; Baiv Yosef ibid.; Bach ibid.; Tai' ve'ei' 16; Sma ibid. s.k. 40; Urim Vetumim ibid. Turim 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 as 1 and cheilek 10 Y.D. siman 58 (to Rav Pe'alim ibid., as 23).

⁵ Shulchan Aruch C.M. 370:3, 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.

⁸ Cf. Shu"t Ziknei Yehudah (this teshuvah was also published in Pachad Yitzchak (Lampromti) cheilek 3 as ches reish cheirem pp. 53b-55b; R' Chaim Jachter, Gray Matter (Vol. 1) pp. 125-132.

⁹ Rashi ibid. 24b s.v. Kol ki hei; Tosfos ibid. s.v. Kol ki hei.

³ Ibid. 25a-b.

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only in earlier times, when few non-Jews lived in Jewish areas, would a treifah be given to dogs.

Later, when Jews often lived among large populations of non-Jews, they could sell their treifos to them. Rashi himself writes (in the first part of his commentary on this *pasuk*), based

on the Mechilta, that since the Torah says one may sell a *neveilah* (an animal not properly slaughtered) to a non-Jew (Dvarim 14:21), the same applies to a treifah.

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submitting his reports, who ruled that he must refuse, even if it meant losing his livelihood.



The common English translation of the verb "nishba" is "swear" (see Chochmas Adam 93:5

regarding the Yiddish "shverin"), so using that word to confirm one's statement is a full-fledged *shvuah*.

The *Acharonim* debate the status of a written *shvuah* or affidavit. The Noda Bihudah (Y.D. 1:68) rules that a nonverbal expression is not a *shvuah*. But the Chasam Sofer (Teshuvos Y.D. 220) says that it is (and is even stronger than a verbal one).

Many *Acharonim* suggest that a written oath is only a *shvuah* if one writes the words "I swear," but not if he affixes his signature to a text that already contains *shvuah* language (see Noda Bihudah ibid., and others cited in Tzitz Eliezer 7:50). The Chasam Sofer (ibid.), however, rules stringently.

Recent *poskim* dealt extensively with the question of whether digital text is considered *ksav* with regard to the prohibition of writing of Shabbos (see Dirshu Mishnah Brurah *siman* 340 note 58). Some authorities consider it to be *ksivah mide'Oreisa*, which has ramifications for the question of *shvuah* as well.

Therefore, you should not sign the document, whether physically or digitally, even if it means a financial loss. If you risk a severe loss or severe legal difficulties, a *rav* should be consulted about whether you may sign digitally.

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.

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