



Occasional studies from the casebook of gambling, games, risk and regulation

Skill, chance and uncertainty: three different (but related) concepts in English gambling law

Whether a product is gaming, a lottery, a bet or a lawful contest often turns on three words which the public uses loosely and the law does not. This piece explains what each means, why they must be kept apart, and how they work in the definitions of gaming, lotteries and betting.

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THE THREE POINTS TO REMEMBER

- In gambling law, “chance” means a deliberate random element, such as a dice, a shuffle or a random number generator. It does not mean the ordinary unpredictability of life.
- Uncertainty is not chance. Estimating or guessing an answer which nobody can know precisely is still a skilful activity, and a contest full of unknowns can be one of pure skill.
- For gaming, any real element of chance is enough, and chance can enter through the way winners are judged. For lotteries, the question is whether skill filters out a significant proportion of people.

1. Three words, often confused

1. The Gambling Act 2005 treats skill and chance as opposing ideas in its definitions of gaming (s.6) and of a lottery (s.14). Uncertainty is not defined at all, but it is present in almost every contest, game and bet. The mistake which causes most trouble is to treat uncertainty as if it were chance.
2. In ordinary speech “chance” does at least three jobs. It can mean an opportunity (“I had the chance to visit the Eiffel Tower”), a probability (“she has a good chance of passing”) or a random outcome (“roulette is a game of chance”). Only the third meaning is relevant in gambling law, and much confusion comes from importing the other two.
3. The three concepts form a triangle. Each is related to the others, but they are not interchangeable, and a product which is analysed with the wrong one can easily be put in the wrong legal category.

2. Chance: a deliberate random element

1. **Chance is designed in.** In my view chance, in the statutory sense, arises where (and only where) a deliberate random process forms part of the arrangement. It is there to make the result unknowable and unpredictable as between the participants. The shuffle of a pack, the roll of a dice and the spin of a roulette wheel are the classic examples.

2. No amount of practice makes anyone better at predicting the next spin of a roulette wheel. Whether the player is clever or careless, experienced or a beginner, a true element of chance treats everyone equally.
3. A known probability distribution does not turn chance into skill. A total of 7 is more likely than 2 when two dice are thrown, and a player who knows that may bet more sensibly. The throw itself is still random. Skill exercised around a random event may make the game one of mixed skill and chance, but the random event remains chance.
4. The wording of s.6 supports a narrow reading. It speaks of a game which involves an “element of chance”. The word “element” suggests something discrete and identifiable, and the Gaming Act 1968 used the same phrase for the randomising mechanism inside a gaming machine.

3. Uncertainty is not chance

1. Many things are uncertain without being random. The outcome of an election is uncertain because it depends on millions of individual decisions. The contents of a wrapped present are uncertain only to the person unwrapping it. Neither involves chance in the legal sense.
2. Skill games are full of uncertainty. When white makes the first move in chess, black does not know which of the 20 available moves will be played. A quiz contestant does not know the next category. In an esports game, opponents appear from concealed positions. None of these makes the game one of chance.
3. **Estimating is a skill.** A person asked to estimate or guess something which nobody can know precisely is still exercising skill. Knowledge, experience and judgment narrow the range of sensible answers, even if they cannot deliver the exact one. The fact that no one can know the answer with absolute precision does not make the exercise chance-based. What life throws at the participants is uncertainty. Chance is something deliberately built into the arrangement.
4. The courts have drawn the same line. In *Hall v Cox* [1899] 1 QB 198 the Court of Appeal held that a competition to forecast the number of deaths in London in a given week was not a lottery, although no one could know the answer with certainty. In *Barnes v Strathern* 1929 JC 41 Lord Justice-General Clyde put it memorably: “There is, of course, an element of chance in all human achievements; but when success or failure ... can be predicted (even approximately) or influenced (materially) by human knowledge, experience, art, or skill, the occurrence of success or failure is not, in ordinary language, said to be a matter of chance”.
5. The Supreme Court of Canada, applying a test very close to our own in *Ross, Banks and Dyson v The Queen* [1968] SCR 786, said that the statute contemplated “not the unpredictables that may occasionally defeat skill but the systematic resort to chance involved in many games such as the throw of dice, the deal of cards”. That passage draws the line exactly where it should be, and would, I think, be persuasive before an English court.

4. Skill

1. Skill is the easiest of the three to recognise. It covers physical abilities (speed, precision, co-ordination, stamina) and mental ones (knowledge, memory, reasoning, strategy, the assessment of risk). In *Scott v DPP* [1914] 2 KB 868 Atkin J accepted that “any kind of skill or dexterity, whether bodily or mental” could count.
2. **Skill does not become chance at its limits.** A darts player can group three darts in the treble twenty. It would be absurd to say that, beyond some level of precision, a better player wins by luck. The same is true of a tennis player who pulls off an impossible shot, or a quiz contestant who knows the answer to an obscure question. Treating everything beyond the limit of visible skill as chance invites a Sorites paradox: no one can say at which grain of sand the heap appears.

5. Gaming: how much chance is enough?

1. Under s.6(2) a game of chance includes a game with both an element of chance and an element of skill, and a game whose element of chance can be eliminated by superlative skill. In *R v Kelly* [2008] EWCA Crim 137

the Court of Appeal rejected a predominance test: poker was a game of chance even though skill was said to predominate. A trivial element, such as deciding who goes first, is disregarded.

6. Spot the ball: chance in the judging

1. Spot the ball competitions have troubled the courts for many years, and for different reasons. The two leading cases reach different results because they ask different questions.
2. In *News of the World v Friend* [1973] 1 WLR 248 the House of Lords considered whether the competition was an unlawful forecast of the result of a future event under s.47 of the Betting, Gaming and Lotteries Act 1963. It held that it was not. Competitors were solving a picture puzzle by the exercise of skill, and their entries were judged by experts doing the same thing.
3. In *IFX Investment Company Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 436 the question was whether spot the ball was gaming for VAT purposes. The First-tier Tribunal found, on the evidence, that so many entries fell within the thickness of a sheet of paper, and the scanning equipment introduced so much random “noise”, that the means of judging the entries was itself fallible. The result was in fact decided by chance, and the game was held to be gaming. The Court of Appeal did not disturb that finding.
4. **The lesson is practical.** However much skill goes into an entry, a contest may still be a game of chance if the process for deciding the winner introduces randomness. The judging mechanism deserves as much scrutiny as the task set for the players.

7. Lotteries: “wholly on chance”

1. A lottery requires prizes to be allocated by a process which relies “wholly on chance” (s.14(2)(c)), or, in a complex lottery, a first process which does so (s.14(3)(d)). Chance here should again be understood in its random sense.
2. Section 14(5) then treats a process requiring skill, judgment or knowledge as relying wholly on chance if the requirement cannot reasonably be expected to prevent a significant proportion of participants from receiving a prize, and cannot reasonably be expected to prevent a significant proportion of those who wish to take part from doing so. Put positively, enough skill to knock out, or deter, a significant proportion of people takes the arrangement outside the definition.
3. **Substance, not form.** The courts have long looked behind colourable skill. Identifying a match which burned with a green flame, or spotting a manufacturer's appliances in a shop window, required no real merit, and the schemes were lotteries. The Commission's guidance on prize competitions asks the same question: did the requirement in fact eliminate a significant proportion and, if not, on what basis did the organiser reasonably expect that it would?

8. Skill and betting

1. Betting needs no chance at all. A bet on a football match is a bet on an event decided by skill, and s.9(2) confirms that a bet may even relate to an event which has already happened. Section 11 treats paying to guess an outcome for a prize as betting, and s.11(2) provides that guessing “includes a reference to predicting using skill or judgment”. The Act therefore itself recognises that a guess can be a skilful prediction. Removing every element of chance may take a contest outside gaming and lotteries, but it will not of itself take it outside betting.

9. Practical conclusions

In my view the three concepts must be kept rigorously apart. Chance means a deliberate random element. Uncertainty is the ordinary condition of any contest, and an informed estimate of an unknowable answer is still an exercise of skill. Skill can take a product outside gaming only if no real random element remains, and outside the

lottery definition only if it genuinely filters out a significant proportion of people. Anyone designing a contest for prizes should identify every point at which the result could be affected by something other than the player's own ability, decide whether each is chance or mere uncertainty, look closely at how winners are judged, and keep a record of that analysis. A definitive view on any particular product depends on its detailed mechanics and on evidence of how it is actually played.

This article compresses and abbreviates the thoughts and musings of many years into a few hundred words, so please forgive its breathlessness.

If you have a problem which involves the issue of skill or chance in relation to a prize contest or a game, and you need to understand the distinctions, please feel free to get in touch.

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