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GOLF AND TORTS: AN INTERESTING TWOSOME

JOHN J. KIRCHER*

I. INTRODUCTION

When I was approached about writing this article, its concept took me a bit by surprise. As someone who became an avid golfer as a teenager and shortly thereafter developed a life-long interest in the law of Torts, thinking of the two as linked was, I must admit, very odd indeed. I view golf as a pleasurable pastime. It is an activity carried out in a "pastoral setting."¹ It is something that I concentrate upon only when I am not involved in teaching, research, and writing about Torts. Torts, on the other hand, are about trauma, harm – the invasion of the interests of others. One deals with Torts in classrooms, offices, and courtrooms – hardly pastoral settings. I cannot even recall ever drafting a Torts exam question involving one golfer harming another. That may now change!

Of course, upon reflection it became obvious that there can be a coming together of the two. After all, golfers swing their clubs at speeds approaching 100 miles per hour in order to propel hard balls considerable distances at speeds almost half again as fast.² Anyone who has ever watched a professional golf tournament knows that even the best golfers cannot always control the direction of their shots.³ Any golfer's inability to always control shot direction and distance places people and property in peril of being struck by a ball. Furthermore, all but a few golfers play the game on courses that are owned and operated by others. There they are exposed not only to errant shots of other golfers, but also to any dangerous conditions or equipment located on the course. Finally, the balls, clubs, and other equipment used by golfers are products that may be defectively made or designed, and thus potential product liability issues exist.

In this article I will explore golf and Torts from the standpoint of three possible Tort defendants: 1) the golfer; 2) the golf course owner or

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1. Nussbaum v. Lacopo, 265 N.E.2d 762, 765 (N.Y. 1970).

2. E-mail from John Spitzer, Assistant Technical Director, United States Golf Association, to John J. Kircher, Professor of Law, Marquette University (July 5, 2001) (on file with author).

3. This point was brought vividly home to me while I worked as a volunteer marshal at the 2001 Greater Milwaukee Open.

operator; and 3) the golf equipment seller. My purpose will be to determine whether the meeting of golf and Torts results in any situations that are unique as respects the way the rules of Tort law are otherwise applied.

II. THE GOLFER

As previously noted, golf is a game in which clubs, ranging in weight from eleven to fourteen ounces, are used to strike and propel a ball, less than two inches in diameter and weighing a bit over an ounce and a half,⁴ toward a target – the “hole.” My research has revealed no authority for the proposition that the game of golf is an “abnormally dangerous activity” as to which the rules of strict liability would apply.⁵ Thus, if the law of Torts is to be applied to the activity of golfing, one would expect that consideration should be given to another theory.

Negligence, with its famed quartet of duty, breach, cause, and harm, would appear the most logical theory to be applied to those engaged in the game of golf. Taking a forceful swing at a small, hard golf ball with a metal club in order to cause the ball to travel a substantial distance at great speeds portends a risk of harm to those persons or things in the path of the ball.⁶ However, interestingly enough, a number of courts have disdained negligence as the proper standard to be applied to golfers. For example, in *Thompson v. McNeill*⁷ the plaintiff was injured when a member of her foursome, who was at a right angle to the plaintiff and some twelve to fifteen yards away, mis-hit a shot. The plaintiff and her husband brought a negligence action against the other golfer.⁸ The trial court dismissed the action based on earlier Ohio precedent, which had determined that the state does not recognize a cause of action in negligence for one injured in a sporting activity by a co-participant.⁹ On appeal, the Ohio Supreme Court affirmed. The court thought it was important “to fashion a special rule for tort liability between participants in

4. According to the author's digital postal scale measurement of his clubs and the ball he customarily uses.

5. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (1977). The only abnormal danger is usually to the psyche of the golfer!

6. It is interesting that in baseball, players like Barry Bonds, Mark McGwire, or Sammy Sosa are dubbed “sluggers” because they regularly hit homeruns of over 300 feet (100 yds.). Yet a rank amateur can regularly hit a golf ball over 600 feet (200 yds.) without even coming close to the shots of a top professional like Tiger Woods, whose longest shots are often in excess of 900 feet (300 yds.).

7. 559 N.E.2d 705 (Ohio 1990).

8. *Id.* at 706.

9. *Id.* at 707 (citing *Hanson v. Kynast*, 526 N.E.2d 327, 329 (Ohio 1987)).

a sporting event because playing fields, golf courses, and boxing rings are places in which behavior that would give rise to tort liability under ordinary circumstances is accepted and indeed encouraged."¹⁰ Obviously then, such a rule would not apply to non-participants.

Explaining its rationale, the *Thompson* court said that "[t]he difficulty in applying . . . principles of negligence to sports is that risk of inadvertent harm is often built into the sport."¹¹ Continuing further with its analysis of risks that are expected and those that are not, the court stated:

Acts that would give rise to tort liability for negligence on a city street or in a backyard are not negligent in the context of a game where such an act is foreseeable and within the rules. For instance, a golfer who hits practice balls in his backyard and inadvertently hits a neighbor who is gardening or mowing the lawn next door must be held to a different standard than a golfer whose drive hits another golfer on a golf course. A principal difference is the golfer's duty to the one he hit. The neighbor, unlike the other golfer or spectator on the course, has not agreed to participate or watch and cannot be expected to foresee or accept the attendant risk of injury. Conversely, the spectator or participant must accept from a participant conduct associated with that sport. Thus a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct. Were we to find such a duty between co-participants in a sport, we might well stifle the rewards of athletic competition.¹²

It concluded that while there could be no actionable negligence between participants in a sport, liability could arise from acts involving intentional torts or reckless misconduct.¹³ Courts in other jurisdictions have taken a similar approach.¹⁴ The New Jersey court found that many legal

10. *Thompson*, 559 N.E.2d at 707.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Dilger v. Moyles*, 63 Cal. Rptr. 2d 591 (Cal. App. 1997); *Hoke v. Cullinan*, 914 S.W.2d 335 (Ky. 1995) (tennis accident, but blanket application of rule); *Gray v. Giroux*, 730 N.E.2d 338 (Mass. App. Ct. 2000); *Schick v. Ferolito*, 767 A.2d 962 (N.J. 2001); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614 (Tex. App. 1993); *Monk v. Phillips*, 983 S.W.2d 323 (Tex. App. 1999). The positions taken by courts in other jurisdictions as to other sports indicate that a similar approach would be taken if golf was at issue. *Jaworski v. Kiernan*, 696 A.2d 332 (Conn. 1997) (recreational soccer); *Picou v. Hartford Ins. Co.*, 558 So. 2d 787 (La. Ct. App. 1990) (softball game); *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517 (Mich. 1999) (ice

commentators support the view that the position it and others have taken should be applied to all sports.¹⁵ It stated:

The policies of promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents are furthered by the application of the heightened standard of care to all recreational sports. We perceive no persuasive reason to apply an artificial distinction between "contact" and "noncontact" sports. In fact, only a minority of courts do so. We find that distinction contrary to the common sense notion that risk of injury is a "common and inherent aspect" of athletic effort generally. The risk arises in myriad forms and for many reasons. It may arise from the physical nature of the athletic endeavor creating the possibility, or likelihood, of direct physical contact with another player or with a ball thrown or hit among players.¹⁶

It takes no great imagination to envision how one could commit the intentional tort of battery by deliberately striking another person with a golf club or ball.¹⁷ In fact, I venture to say that, from time to time, many golfers have been tempted to commit such an intentional tort because of the conduct of a playing partner or others encountered on a golf course. As to recklessness, which lies in the gray area between intentional torts and negligence, the Restatement provides:

The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.¹⁸

Thus, according to Prosser and Keeton, recklessness involves "disregard of a known or obvious risk that was so great as to make it highly proba-

skating); *Ross v. Clouser*, 637 S.W.2d 11 (Mo. 1982) (en banc) (softball game); *Dotzler v. Tuttle*, 449 N.W.2d 774 (Neb. 1990) ("pick-up" basketball game).

15. *Schick*, 767 A.2d at 967-68 (citing *Brendon D. Miller, Hoke v. Cullinan: Recklessness as the Standard for Recreational Sports Injuries*, 23 N. KY. L. REV., 409, 434 (1996); *Mel Narol, Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29 (1991); *Frank J. DeAngelis, Note, Duty of Care Applicable to Participants in Informal Recreational Sports is to Avoid the Infliction of Injury Caused by Reckless or Intentional Conduct*, 5 SETON HALL J. SPORT L. 509 (1995); *Melissa Cohen, Note, Co-Participants in Recreational Activities Owe Each Other a Duty Not To Act Recklessly*, 10 SETON HALL J. SPORT L. 187 (2000); *Karen M. Vieira, Comment, "Fore!" May Be Just Par For the Course*, 4 SETON HALL J. SPORT L. 181 (1994)).

16. *Schick*, 767 A.2d at 968 (citations omitted).

17. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

18. *Id.* § 500.

ble that harm would follow, and which is thus usually accompanied by conscious indifference to the consequences."¹⁹ A good example, for those familiar with the movie "Caddyshack," comes from the scene in which the character "Judge Smalls" became so enraged about missing a putt that he violently threw his putter away, only to have it strike a woman sitting on the clubhouse patio eating lunch.²⁰ However, caution in categorization should be exercised. As noted by the court in *Thompson* "[w]e cannot provide a single list of actions that will give rise to tort liability for recklessness or intentional misconduct in every sport. The issue can be resolved in each case only by recourse to the rules and customs of the game and the facts of the incident."²¹

Despite the foregoing authority limiting the duty of golfers to each other, some jurisdictions apparently are comfortable with application of simple negligence rules to those who engage in the game of golf. In *Cavin v. Kasser*,²² for example, the plaintiff was waiting to tee off and was struck by a ball hit by the defendant who was playing on an adjoining hole. The plaintiff heard the defendant shout the warning "fore," but moved too late to avoid being struck. The defendant testified that he did not shout the warning until determining that the ball was not taking the path that he intended. In affirming summary judgment for the defendant, the court observed that there is no absolute duty, in the exercise of reasonable care, to warn all in the playing area before making a shot.²³ Instead, "one about to strike a golf ball must exercise ordinary care to warn those within the range of intended flight of the ball or general direction of the drive, and the existence of such a duty to warn must be determined from the facts of each case."²⁴ Thus, the duty to exercise reasonable care existed but was found not to have been breached in this case.²⁵

When the person harmed by the errant shot is not located on the golf course, similar considerations apply. Again, it should be noted that the jurisdictions refusing to apply negligence principles as between participants in the sport would find no such impediment when harm is inflicted upon one who is off of the course. Nevertheless, in *Rinaldo v. McGov-*

19. PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213 (W. Page Keeton et al. eds., 5th ed. 1984).

20. CADDYSHACK (Warner Bros. 1980)

21. *Thompson*, 559 N.E.2d at 708.

22. 820 S.W.2d 647 (Mo. Ct. App. 1991).

23. *Id.* at 651.

24. *Id.* at 650 (quoting *Hoffman v. Polsky*, 386 S.W.2d 376, 378 (Mo. 1965)).

25. *Id.*

ern,²⁶ the plaintiff sustained injuries when the windshield of the car in which she was riding was shattered by a golf ball. The ball was driven by one of the two individual defendants. Apparently there was some doubt as to which of the two hit the shot. It flew off the course on which they were playing, cleared a group of trees and entered a road that was adjacent to the course. The plaintiff's vehicle was traveling on that road. Affirming the summary judgment granted to the golfers by the trial court, the New York Court of Appeals determined that the golfers could not be held liable in negligence on the theory of failure to warn or because of a general lack of due care.²⁷ As to the lack of warning, the court stated:

In general, a golfer preparing to drive a ball has no duty to warn persons "not in the intended line of flight on another tee or fairway." Even more to the point, whatever the extent of a golfer's duty to other players in the immediate vicinity on the golf course, a golfer ordinarily may not be held liable to individuals located entirely outside of the boundaries of the golf course who happen to be hit by a stray, mishit ball.²⁸

The court found it highly questionable that a person riding in an auto would have heard the usual "fore" warning, even if it had been given.²⁹

The duty to warn certainly may relate to the skill, or lack thereof, possessed by an individual golfer and his or her awareness of the risks thereby posed. The case of *Cook v. Johnston*,³⁰ for example, involved a defendant who had a tendency to "shank" certain shots.³¹ He agreed to play a round with three others and one of them, the plaintiff, was unaware of the defendant's tendency in that regard. The game proceeded without incident to the ninth hole. There the defendant had advanced his ball to a spot in the fairway approximately seventy to eighty yards from the green. Before hitting his next shot, he noticed that the plaintiff was seated in a golf cart approximately thirty yards away from the direct and intended line of flight of that shot. When the defendant hit the ball, he realized immediately that he had shanked the shot and yelled "fore."

26. 587 N.E.2d 264 (N.Y. 1991).

27. *Id.* at 266-67.

28. *Id.* at 266 (citations omitted).

29. *Id.*

30. 688 P.2d 215 (Ariz. Ct. App. 1984).

31. *Id.* at 216. The court said that this

usually involves hitting the ball with an eight or nine iron or pitching wedge directly to the right. The shank is the result of hitting the ball while the face of the club is open, sending the ball in a straight line far to the right of the intended line of flight.

Id.

The plaintiff turned his head toward the defendant and the ball struck him in the right eye before he could move out of the way. In the trial that followed, the plaintiff alleged that the defendant was negligent in failing to previously warn him of the tendency to shank the ball on the type of shot in question.³² The court observed that there was a general rule that a golfer has a duty to warn others that he intends to hit the ball when they are in the "zone of danger" and are unaware of his intention.³³ It upheld the jury's finding of liability because the evidence of the defendant's problem with errant shots created a question of fact as to whether the plaintiff was within the zone of danger necessitating such a warning.³⁴

There are also a number of cases dealing with golfers who inadvertently strike others with the golf club itself. Many involve situations in which the golfer causes the contact while taking a practice swing on or near teeing ground or at some practice area such as a driving range. None of the cases are remarkable in that negligence principles are routinely employed. Since they have been collected elsewhere, nothing more need be said.³⁵

As to the duty owed by golfers to others in relation to the risks of the game, one wonders whether there is in fact much of a difference between jurisdictions that apply negligence principles and those that impose liability only for recklessness or intentional torts. Failure to warn those in the "zone of danger" of an impending shot or errant shot may be found negligent in the former and reckless in the latter. The cases point to the fact that in identical situations the results would be the same under either approach.

III. THE COURSE OWNER OR OPERATOR

When considering the potential liability of golf course owners and operators, one should start with an analysis of whether the rules generally applicable to owners and occupiers of land apply in like fashion to the golf course setting.³⁶ The first step in such a process is to determine whether the potential plaintiff was located on or off of the course when the harm occurred. If the plaintiff was on the course, the next step is to

32. *Id.*

33. *Id.* See also *Hollinbeck v. Downey*, 113 N.W.2d 9 (Minn. 1962).

34. *Cook*, 688 P.2d at 217.

35. Boyd J. Peterson, Annotation, *Liability to One Struck By Golf Club*, 63 A.L.R.4th 221 (1988).

36. See generally PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 19, § 57, at 387.

determine whether he or she was a trespasser, licensee, or invitee. That may be important because, at common law, different duties were owed to each class.³⁷ Of course, some jurisdictions have merged two or more of the entrant categories when determining the liability of owners and occupiers.³⁸

Beginning first with plaintiffs located off of the golf course at the time of harm, as a general proposition, owners and occupiers of land owe those outside the premises a duty of reasonable care to protect them from operations taking place on the premises.³⁹ The case of *Nussbaum v. Lacopo*⁴⁰ is instructive in that regard. In *Nussbaum*, the plaintiff's home was located on land abutting the thirteenth hole of the defendant Plandome Country Club. Between the plaintiff's patio and the thirteenth fairway there was approximately twenty to thirty feet of rough that contained a barrier of trees measuring forty-five to sixty feet high. The plaintiff's real property line ran parallel to the thirteenth fairway. However, the direct and proper line of flight from the tee to the green on that hole was at a substantial angle to the right of the property line and the rough. At a time when the rough was dense and the trees were in full foliage, a trespasser entered the course and struck a ball from the thirteenth tee. The shot, described by the court as "a high, bad one,"⁴¹ hooked over the rough and trees and struck the plaintiff who was standing on the patio of his property. The plaintiff alleged that the course was negligent as to the design of the hole in question. The court concluded that no liability could be imposed within the concepts of negligence, stating:

That golf balls were found in the bushes and the fence area on plaintiff's property does not tend to establish any risk. These invasions are the annoyances which must be accepted by one who seeks to reside in the serenity and semi-isolation of such a pastoral setting. Thus, even if notice of these intrusions may be gleaned from the record, no preventive response was required. Remedial steps would be called for only if defendant had notice of a danger. Golf balls found in the areas adjacent to the rough — where, according to plaintiff's evidence, they were discovered — would not have come over the trees. It was that potential occur-

37. *Id.* §§ 57-61, at 386-432.

38. *See, e.g.,* *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (en banc); *Antoniewicz v. Reszcyński*, 236 N.W.2d 1 (Wis. 1975).

39. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 19, § 57, at 387 (citing RESTATEMENT (SECOND) OF TORTS §371).

40. 265 N.E.2d 762 (N.Y. 1970).

41. *Id.* at 764.

rence which might constitute a danger, and no notice of such an incident was given. In fact, plaintiff's wife testified that no golf ball ever struck her house. Certainly, if [the trespasser's] shot were not extraordinary and golf balls had traveled over the trees, plaintiff's house would have been hit.⁴²

The court decided that under the "circumstances the possibility of an accident could not be clear 'to the ordinarily prudent eye.'" ⁴³ The court in *Nussbaum* contrasted the factual situation it faced with that in *Gleason v. Hillcrest Golf Course, Inc.*⁴⁴ In *Gleason*, an auto passenger was injured when the windshield of the car in which she was riding was struck by a golf ball. The turnpike on which the car was operated ran parallel to the hole on the course from which the errant shot exited. At that point the course was lined with a wire fence only six feet high and about twenty-five feet from the road.⁴⁵ The court in *Gleason* stated:

[I]f the owner of land contiguous to the highway is liable to a traveler who falls into an excavation on the land, upon the ground that the owner has not provided a means whereby harm might be reasonably averted to one having no cause to expect danger, then, by analogous reasoning, the converse situation must also determine liability – that the owner of such premises who creates a condition upon his land, or who maintains such a condition in a manner imputing presumptive knowledge thereof, whereby an object from the land injures a lawful traveler upon the roadway, is in duty bound to take appropriate means to ward off the danger.⁴⁶

Cases involving harm to persons or property off of the golf course should turn on a number of factors. Evidence as to the frequency with which balls leave the course, the proximity of people and property to the course boundaries, and the steps that the course owners and operators took to prevent balls from leaving the course would seem crucial. These cases will rise or fall on the perception by the trier of fact as to whether the preventative steps taken were reasonable in light of the risks. Certainly, reasonable golf course operators would reassess these situations as conditions around the course change. Many older courses were once truly "country clubs." The same sites are now in urban settings next to busy roadways, with nothing to account for that fact other than the passage of time.

42. *Id.* at 765-66.

43. *Id.* at 766.

44. 265 N.Y.S. 886 (Mun. Ct. 1933).

45. *Id.* at 887.

46. *Id.* at 896.

The owners or operators of a golf course may also find the law of nuisance applicable to the operation of such a facility and its effect upon neighbors. In *Sierra Screw Products v. Azusa Greens, Inc.*,⁴⁷ for example, the owners of land adjacent to a golf course brought an action against the owners of the course to require abatement of what was claimed to be a nuisance resulting from golf balls coming onto the plaintiff's property. Numerous "golf balls [were found to] have entered plaintiff's property from the adjacent third and fourth fairways [of the course,] causing damage to the automobiles of the plaintiff's employees, and on [some] occasion[s]" striking and injuring employees.⁴⁸ Employees were instructed to wear hard hats while working in the area.⁴⁹ On appeal, the court affirmed the trial court's finding of a private nuisance and its entry of a mandatory injunction requiring the owners of the course to redesign the two holes so as to reduce the risk of balls coming onto the plaintiff's property.⁵⁰ Of course, many persons purposefully build or purchase homes adjacent to golf courses. For them, finding a few golf balls in their back yards may not be unusual and the doctrine of coming to a nuisance may be applicable.⁵¹

When considering the liability of the course owner or occupier to golfers and spectators who are actually on the course, general negligence principles should apply. A good example is the case of *Cornell v. Langland*.⁵² It involved a situation in which the plaintiff was on the green of one of the holes at a golf course and was struck by a ball hit by a player who teed off on the same hole. The scorecard showed that the hole was 315 yards in length from tee to green, when in fact the distance was 232 yards from the center of the tee to the center of the green. The golfer whose shot hit the plaintiff said that he decided to hit the ball because of the scorecard yardage and, at the time of the accident, could not understand how he could hit a ball as far as 315 yards. The course manager stated that the yardage was not 315 yards because the green had been moved closer to the tee which occurred after the scorecards had been printed. It appeared that the operators of the course did not want to go to the expense of destroying the supply of old cards and printing new ones.⁵³ The court reasoned that the evidence was sufficient to support a

47. 151 Cal. Rptr. 799 (Ct. App. 1979).

48. *Id.* at 801.

49. *Id.*

50. *Id.* at 806.

51. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 19, § 88B, at 634-36.

52. 440 N.E.2d 985 (Ill. App. Ct. 1982).

53. *Id.* at 987.

negligence claim against the course for failing to advise golfers of the correct yardage.⁵⁴ However, even if the course knew the yardage was incorrect, the failure to change the card did not constitute "the type of intentional, deliberate and outrageous conduct which would support the imposition of punitive damages."⁵⁵ Though the court made no final determination regarding the negligence of the golfer, as the golfer was voluntarily dismissed from the case at the close of the plaintiff's case, the court did find the golfer was misinformed as to the actual yardage, and, based on this misinformation, he reasonably believed that the plaintiff was out of his range when he hit the shot.⁵⁶

The case of *Quesenberry v. Milwaukee County*⁵⁷ presents an interesting situation involving a state statute that exempted landowners from the obligation to keep premises safe for those who participate in recreational activities. The plaintiff suffered a broken leg and other injuries when she stepped into an eighteen-inch diameter hole on the fairway of a course owned by the county. The hole was created by a drainage tile, was covered with grass and was not readily visible, having no warning signs or barriers.⁵⁸ The statute exempted landowners from the "duty to keep the premises safe for entry or use by others for hunting, fishing, trapping, camping, hiking, snowmobiling, berry picking, water sports, sight-seeing, cutting or removing wood, climbing of observation towers or recreational purposes."⁵⁹ The county claimed that it should not be liable as a result of the statute because golf was a "recreational purpose" for which the plaintiff entered the land.⁶⁰ The court looked at the legislative history of the statute and found that it was initially enacted to encourage landowners in the state to open their property to hunters.⁶¹ Although the statute was subsequently amended to include the other enumerated recreational activities, the court construed the term "recreational purpose" as not to include sports such as golf:

[T]he general term "recreational purposes" should be limited to activities similar to the preceding enumerated words. We conclude that the common feature of the enumerated words is that they are the type of activity that one associates being done on land in its natural undeveloped state as contrasted to the more

54. *Id.* at 988.

55. *Id.*

56. *Cornell*, 440 N.E.2d at 989.

57. 317 N.W.2d 468 (Wis. 1982).

58. *Id.* at 470.

59. *Id.* at 469 n.1 (quoting Wis. Stat. § 29.68 (1977)) (emphasis added).

60. *Id.* at 471.

61. *Id.* at 471-72.

structured, landscaped and improved nature of a golf course with its fairways, sand traps, rough and greens created for one purpose: to play the game of golf. However, the enumerated activities may sometimes occur on land that has been developed, such as bird hunting in a corn field or berry picking in a planted berry patch instead of in the woods. But golfing is clearly not the type of activity that is done on land in its natural undeveloped state.⁶²

It is obvious that the writer of the opinion was either a very good golfer or had never in his life played the game. Many golfers spend most of their time on the natural, undeveloped part of golf courses and venture infrequently onto the "structured, landscaped and improved" portions. Nevertheless, the court found the statute inapplicable to golf and reversed the trial court's dismissal of the plaintiff's complaint.⁶³ Subsequently, the Wisconsin Legislature repealed the statute under consideration in *Quesenberry* and enacted a new statute that contains a more expansive list of specific recreational activities, including the phrase "any other outdoor sport."⁶⁴ The act that created the new statute carried a statement of legislative intent that, in part, states that it is "intended to overrule any previous Wisconsin supreme court decisions interpreting [the old statute] if the decision is more restrictive than or inconsistent with the provisions of this act."⁶⁵ If *Quesenberry* was decided under the new statute, the result would no doubt have been different.

Even in California, where as between players no duty is owed other than to avoid recklessness or intentional torts,⁶⁶ a different situation pertains as between the course operator and the golfer. In *Morgan v. Fuji Country USA, Inc.*,⁶⁷ the plaintiff was struck by a ball after he had teed off on the fifth hole. The ball came from the fourth hole, the green that adjoined the fifth tee. The course owner, Fuji, had removed a large pine tree that offered some protection to those on the fifth tee.⁶⁸ The California court explained the difference between duties of golfers and course operators in the following fashion:

As between golfers, the duty is to play within the bounds of the game; to not intentionally injure another player or to engage in conduct "that is so reckless as to be totally outside the range of

62. *Quesenberry*, 317 N.W.2d. at 472.

63. *Id.* at 473-74.

64. WIS. STAT. § 895.52(1)(g) (2000).

65. 1983 Wis. Laws 418 § 1.

66. *Dilger*, 63 Cal. Rptr. 2d at 594.

67. 40 Cal. Rptr. 2d 249 (Ct. App. 1995).

68. *Id.* at 250.

the ordinary activity involved in" golf. The duty of a golf course towards a golfer is to provide a reasonably safe golf course. This duty requires the golf course owner "to minimize the risks without altering the nature of the sport." Thus, the owner of a golf course has an obligation to design a golf course to minimize the risk that players will be hit by golf balls, e.g., by the way the various tees, fairways and greens are aligned or separated. In certain areas of a golf course, because of the alignment or separation of the tee, fairway and/or greens, the golf course owner may also have a duty to provide protection for players from being hit with golf balls "where the greatest danger exists and where such an occurrence is reasonably to be expected" just as a baseball stadium owner may have a duty to provide protection for spectators from thrown bats or errant balls in that part of the stadium where the danger of being hit is particularly high and dangerous.⁶⁹

The court concluded that Fuji owed a duty of care to the player. Evidence presented by the plaintiff that the area of the fifth tee was a particularly dangerous place due to the design of the fourth and fifth tees and the removal of the trees supported a finding that Fuji breached the duty of care that was owed. Fuji argued that because the risk of being hit by a golf ball was obvious, it owed no duty to the plaintiff. The court observed that the obviousness of a risk might, however, support a duty to provide protection.⁷⁰

Persons present on a golf course for reasons other than to play, such as spectators at a tournament, present another interesting situation involving the liability of course owners and operators. Some of these visitors may know little or nothing about the sport and its inherent risks. In *Duffy v. Midlothian Country Club*,⁷¹ the plaintiff was attending a professional golf tournament and was hit in the eye by a golf ball as she was standing in a concession area. The concession area was located between the first and eighteenth fairways of the course. She brought a negligence action against both the course and the sponsoring association, asserting failure to use reasonable care to warn the plaintiff of the danger of the approaching ball and also to restrict the plaintiff from entering an allegedly dangerous area. The trial court granted the defendants' motion for summary judgment based on assertions that the plaintiff was aware of the inherent risks involved in such a tournament, evidence of which

69. *Id.* at 253 (quoting *Knight v. Jewett*, 11 Cal. Rptr. 2d 2 (Ct. App. 1992) (citations omitted)).

70. *Id.* at 253.

71. 415 N.E.2d 1099 (Ill. App. Ct. 1980).

came primarily from her deposition.⁷² On appeal, the court determined that the defendants would have had a duty of reasonable care toward spectators if they were business visitors. The standard of care and the plaintiff's appreciation of the danger were for the jury to determine.⁷³

In *Grisim v. TapeMark Charity Pro-Am Golf Tournament*,⁷⁴ the plaintiff was likewise a spectator at a tournament. She was seated on the grass some thirty to fifty feet to the left of the eighteenth green when she was struck by the shot of an approaching player. There were no ropes, barricades or signs indicating spectator areas, nor were there marshals, ushers or officials to guide spectators. The trial court granted the defendant's motion for summary judgment.⁷⁵ It found that because the plaintiff made the choice of where to sit, "primary assumption of risk applied and 'she assumed the risk to protect herself from known dangers or such dangers incident to the game as would be apparent to a reasonable person in the exercise of due care.'"⁷⁶ The appellate court reversed finding that, in Minnesota, so-called "primary assumption of risk" turned on the question of whether, at inherently dangerous sporting events, spectators have a choice between protected and dangerous areas from which to observe the sport. It determined that in this case a genuine issue of material fact existed as to whether adequate protection was provided at the tournament. The court, on a motion for summary judgment, could not resolve that issue. It concluded that if the defendants had provided adequate protection and the plaintiff chose not to take advantage of that seating, then primary assumption of risk would apply.⁷⁷

As the foregoing discussion illustrates, the liability of owners and operators of golf courses to those who are either on or off of the course will be resolved by the rules of the jurisdiction that are usually applied in actions against owners and occupiers of land. General negligence principles will be followed and, as to plaintiffs who were on the property at the time of injury, status such as trespasser, licensee, or invitee may be important.

72. *Id.* at 1101-03.

73. *Id.* at 1105.

74. 394 N.W.2d 261 (Minn. Ct. App. 1986), *rev'd in part, en banc*, 415 N.W.2d 874 (Minn. 1987).

75. *Id.* at 262.

76. *Id.* at 263.

77. *Id.* at 264.

IV. THE GOLF EQUIPMENT SELLER

Golfers employ a variety of products in order to play the game. In addition to clothing, these include such items as balls, clubs, bags, and cleated shoes. However, with one exception, the only reported cases that have been found relating to golf products and Tort theories involve the motorized vehicles, known as "golf carts," used to transport golfers and their playing equipment around a course.⁷⁸

It is surprising that few cases were found that involved personal injuries caused by defective golf clubs. Some may be unaware of the fact that the heads of most golf clubs are secured to their shafts with nothing more than epoxy glue.⁷⁹ If not properly installed, the head can separate from the shaft during the swing. This was the author's experience in one instance and the cause was found to be improper insertion of a graphite shaft.⁸⁰ If, as previously noted, the speed of the golf swing approaches one hundred miles per hour, simple physics dictates that the club head will leave the shaft with that initial velocity – until it comes in contact with something or someone. It is obvious that substantial harm could result in such a case.

From the few cases that have been found, it appears certain that basic product liability rules will be applied to golf equipment sellers. To the extent that the "pro" at a country club sells equipment to club members and others, he or she may be in for a rude awakening. No doubt the pro would be considered a "seller" for the purposes of strict liability in tort,⁸¹ or a "merchant" for the purposes of an implied warranty of merchantability under the Uniform Commercial Code.⁸²

The cases make it abundantly clear that the sellers of golf products will be treated no differently than other sellers when bodily injury or property damage results from defective equipment. It should be noted, of course, that the doctrine of strict liability in tort has been extended to product lessors as well as to actual sellers such as manufacturers and

78. See, e.g., *Donnelly v. Club Car, Inc.*, 724 So. 2d 25 (Ala. Civ. App. 1998); *Shaffner v. City of Riverview*, 397 N.W.2d 835 (Mich. Ct. App. 1987); *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984); *Sipari v. Villa Olivia Country Club*, 380 N.E.2d 819 (Ill. App. Ct. 1978); *Blevins v. Cushman Motors*, 551 S.W.2d 602 (Mo. 1977) (en banc).

79. RALPH MALTBY, *GOLF CLUB DESIGN, FITTING, ALTERATION & REPAIR* 37, 90 (1974).

80. Interview with Carl Christensen, 1998 Northern Clubmaker of the Year, Golf Clubmakers Ass'n, in Waukesha, Wis. (Aug. 7, 2001).

81. RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965).

82. U.C.C. § 2-104(1) (1977).

retailers.⁸³ This is important due to the fact that most golf courses rent golf clubs and golf carts. In *Sipari v. Villa Olivia Country Club*,⁸⁴ for example the plaintiff was seriously injured when the cart in which he was riding overturned and then fell on top of him. In his action against the cart manufacturer and the course that leased the cart to him, the court determined that the action could proceed against the lessor even though there was an exculpation clause in the rental ticket that the plaintiff signed.⁸⁵ The court stated that "[t]he strict liability imposed [by previous authority] applies not only to manufacturers but also to distributors and retailers, and lessors. . . . To hold otherwise would be to contravene the essence of strict tort liability."⁸⁶

The one case found that dealt with golf equipment other than a riding cart is *Hauter v. Zogarts*.⁸⁷ It was concerned with a golf practice device known as the "Golfing Gizmo." The product was described by the court as:

a simple device consisting of two metal pegs, two cords – one elastic, one cotton – and a regulation golf ball. After the pegs are driven into the ground approximately 25 inches apart, the elastic cord is looped over them. The cotton cord, measuring 21 feet in length, ties to the middle of the elastic cord. The ball is attached to the end of the cotton cord. When the cords are extended, the Gizmo resembles the shape of a large letter "T," with the ball resting at the base.⁸⁸

The user stands at the ball to hit shots. The elastic cord is intended to stop the ball from traveling the distance it would ordinarily travel without being so restricted.⁸⁹ The label on the shipping carton and the instructions urge the player to use full power with shots and also stated "COMPLETELY SAFE BALL WILL NOT HIT PLAYER."⁹⁰ With his first use of the product the plaintiff hit a shot and the ball came back and

83. See, e.g., *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976); *Price v. Shell Oil Co.*, 466 P.2d 722 (Cal. 1970) (en banc); *Cintrone v. Hertz Truck Leasing & Rental Servs.*, 212 A.2d 769 (N.J. 1965).

84. 380 N.E.2d 819 (Ill. App. Ct. 1978).

85. *Id.* at 823.

86. See also *Donnelly*, 724 So. 2d 25; *Shaffner*, 397 N.W.2d 835; *Meister*, 462 So. 2d 1071; *Cavers v. Cushman Motor Sales, Inc.*, 157 Cal. Rptr. 142 (Ct. App. 1979); *Blevins*, 551 S.W.2d 602.

87. 534 P.2d 377 (Cal. 1975) (en banc).

88. *Id.* at 379.

89. *Id.*

90. *Id.*

hit him in the head. This caused severe injury.⁹¹ On appeal the California Supreme Court concluded:

[The plaintiff's] testimony shows that he read and relied upon defendants' representation; he was impressed by "something on the cover dealing with the safety of the item." More importantly, defendants presented no evidence which could remove their assurance of safety from the basis of the bargain. The trial court properly concluded, therefore, that defendants expressly warranted the safety of their product and are liable for [the plaintiff's] injuries which resulted from a breach of that warranty.⁹²

Thus, as noted previously, sellers of golf products will be treated no differently than sellers of other products in cases involving those who are injured by those products. One would not expect otherwise.

V. CONCLUSION

Except for those situations previously noted that involve golfers who are defendants, Tort principles appear to be applied in golf-related cases no differently than they are with respect to any other activity. The case could be made that even with golfer-defendants the application of principles of reasonable care would produce no different results than would be the case in jurisdictions that preclude liability except for recklessness or intentional torts.

While the affirmative defenses available to defendants in golf cases have not been discussed in any detail, suffice it to say that the standard affirmative defenses such as contributory negligence, implied assumption of risk, and the like, where applicable under current law, should also apply in golf cases. With the adoption of comparative negligence, a number of jurisdictions have eliminated the doctrine of implied assumption of risk.⁹³ Of course, a Tort purist would argue that implied assumption of risk has nothing to do with the issue of reasonable care other than to relieve the defendant of any duty to the plaintiff – in effect, similar to the privilege of consent as to intentional torts. Nevertheless, the defense should be alert to the fact that implied assumption of risk may not be a viable defense in a golf case, with only the reasonableness of the plaintiff's conduct in light of the perceived risk an issue.

91. *Id.*

92. *Hauter*, 534 P.2d at 384-85.

93. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 19, § 68, at 495-96.

