

WHEN THE GAME OF GOLF BECOMES A NUISANCE

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Abstract

Golf is a popular outdoor sport played in many countries across the world. However, the fact it involves hitting a hard ball considerable distances can create problems if the balls are mishit and stray from the course. When it does, there can be a potential claim in nuisance, with the golf club itself being liable once it becomes aware of the nuisance. Often it is an injunction to prevent the continuation of the nuisance that is sought by the plaintiff, though damages can, and have, been awarded. If there is a problem with balls being mishit off the course, the golf club is required to remedy the situation by putting up barriers, or redesigning the course by, for example, shortening the holes in the area where there is a problem.

Key words: *golf, liability, nuisance*

INTRODUCTION

Golf is an old sport, the game considered to have been invented in Scotland in the eighteenth century. The early balls were made out of wood or condensed feathers, and that combined with wooden shafted clubs, meant that the balls were never hit very far. However, with the development of harder balls and metal shafted clubs, the balls began to be hit much further. While this was obviously of benefit to players of all abilities, it also meant that mishit balls travelled much further. This, in turn, raises legal issues about the liability of individuals and golf clubs in regard to personal injuries, or damage to property, caused by these mishit balls. This paper will examine the legal ramifications arising from mishit balls, particularly those hit off the golf course and out onto adjoining land.

The Law of Negligence

Competitors in sport owe a duty of care to avoid a foreseeable risk of injury to other competitors, and golfers are no exception. In *Ollier v Magnetic Island Country Club* [2003] QSC 263, for instance, a golfer hit another golfer with his tee shot at the Magnetic Island Country Club in North Queensland, Australia. The plaintiff, Glenn Ollier, had been in the process of playing a ball onto the eighth green when he was struck by a ball hit by the second defendant, Mark Shanahan. Ollier was taken to hospital where a CT scan revealed a left sided subdural haematoma, and a left sided cerebral oedema. He later died as a result of these injuries. In determining liability, the trial judge referred to the rules of golf, specifically Section 1 entitled 'Etiquette', which contains the statement that 'no player should play until the players in front are out of range.' It was held that the plaintiff was in a position on the golf course where he ought to have been seen by the defendant, and was in a position where the defendant might have been expected to look prior to hitting off (*Ollier v Magnetic Island Country Club* [2003] QSC 263 at [48]). The trial judge then rejected the assumed risk argument stating that being struck by a ball while being in range was not a risk inherent in the game of golf, and that the rules of golf expressly sought to prevent it from happening. A duty of care was therefore held to exist, with there then being a breach of this duty because the defendant had been defective in his lookout and had caused serious injury to the plaintiff. The club itself was held not to be liable

as it was not required to make sure that every player was aware of the first rule of golf (*Ollier v Magnetic Island Country Club* [2003] QSC 263 at [58]).

Likewise, in *Lewis v Buckpool Golf Club* [1993] SLT 43, a high handicapper was in breach of a duty of care after failing to wait before hitting from the fifth tee, with his resulting mishit injuring a player on the adjacent fourth green. It is suggested a significant aspect of this case was the proximity of the plaintiff as the green would have been relatively close to the tee, thus making it more likely that a player could have been seriously injured (Davies 2010, 23). In *Pearson v Lightning*, *The Times* 30 April 1998, 142 SJ LB 143 at 5, it was held that given the difficulty of the shot, the likelihood of a deflection and Pearson's presence in the same stretch of rough on the same fairway, 'the injury was sufficiently foreseeable to establish both the duty of care and its breach.'

However, in a number of cases it has been held that a duty of care had not been breached. In *Ellison v Rogers* (1967) 67 DLR (2d) 21, for instance, a mishit tee-shot that struck another golfer on an adjacent fairway was held to be a pure accident since it was not unusual to have a ball stray accidentally from one fairway to another during a game of golf. This was therefore a normal risk of the game, one that was assumed by all golfers (*Ellison v Rogers* (1967) 67 DLR (2d) 21 at 31). Similarly, there was no breach of a duty of care in *Brewer v Delo* [1967] 1 Lloyd's Rep 488 where the defendant had hooked his tee shot and struck the plaintiff who was 180 metres away on an adjacent hole. In *Pollard v Trude* [2008] QSC 119, meanwhile, a player was hit by someone in his own group after going ahead in order to find his ball. It was held that there had been no breach of duty of care (*Pollard v Trude* [2008] QSC 119 at [33]).

Thus, it is clear that golfers owe a duty of care to other players on the course, and in *Pearson v Lightning* it was noted that 'the outcome of any case concerning golf course injuries must depend on its particular facts' (*Pearson v Lightning*, *The Times* 30 April 1998, 142 SJ LB 143 at 6). It is therefore negligence that is the applicable law in regard to injuries sustained on the golf course itself. In *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214, which involved balls being hit off the course and causing property damage,

both negligence and nuisance were argued by the defendant. The court, however, held that given these facts, nuisance was the more likely cause of action. Thus, while it is possible that a golfer owes a duty of care to strangers off the course, the more likely legal action is nuisance (*Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214 at [60]).

The Law of Nuisance

While trespass to land requires a direct interference of the land, if it is an indirect interference with the land then it can lead to an action for nuisance. This can be a private nuisance, involving an unreasonable and unlawful interference with an occupier's use and enjoyment of land. A public nuisance on the other hand is one that affects the public at large and involves an unlawful act, or omission, which endangers the lives, safety, health, property or comfort of the public (Thorpe et al 2017, 312.).

The application of the law of nuisance to sport is perhaps best illustrated by *Miller v Jackson* [1977] QB 966 involving cricket which, like golf, can result in a hard ball being hit onto public or private land. The Lintz Cricket Club had been playing at its ground for over 70 years after leasing it from the National Coal Board. However, in the early 1970's a new housing estate was built adjacent to the ground after this land was sold off to developers. Problems then arose from balls being hit over the fence, sometimes causing damage to the houses, and interfering with the use of the gardens. The club extended the fence to a height of 15 feet (5m), but in the years 1975 and 1976, over thirty balls still landed in the adjacent houses. Despite the club offering to pay for any damages to the property, legal action was taken, the plaintiffs claiming that the balls being hit onto their land constituted a private nuisance and that the defendants were negligent.

Geoffrey Lane LJ stated there was no doubt future interference with the plaintiff's land would occur, and while acknowledging the need to balance the rights of individuals to enjoy their gardens against the rights of the public to enjoy a legal pastime, the real risk of serious injury to the occupants meant that the defendants were liable in nuisance (*Miller v Jackson* [1977] QB 966 at 986). His Lordship therefore upheld the granting of an injunction to prevent the club from playing at the ground and also awarded damages. While stating that the defendants

were guilty of nuisance, Cumming-Bruce LJ was of the opinion that the special circumstances of the case inhibited a court of equity from granting an injunction. These special circumstances were the fact that it was obvious to the plaintiffs when they bought the house that it was adjacent to a cricket ground and they had selected a house that had the benefit of an open space beside it (*Miller v Jackson* [1977] QB 966 at 989). Lord Denning meanwhile held the public right of the defendants prevailed over the private rights of the plaintiffs and that an injunction was not to be granted (*Miller v Jackson* [1977] QB 966 at 982). The Lintz Cricket Club was therefore permitted to continue playing, though damages of £400 were awarded to the plaintiffs for past and future damage.

What this case highlights is two important considerations in regard to a claim in nuisance. The first is the principle of ‘coming to the nuisance’ which means it does not matter how long the land has been in use, if this use causes an interference with someone’s else’s land, then it is a nuisance. Geoffrey Lane LJ, for instance, stated in *Miller v Jackson* that there was no answer to a claim in nuisance that ‘the plaintiff had brought the trouble on his own head by building or coming to live in a house so close to the defendant’s premises that he would inevitably be affected by the defendant’s activities’ (*Miller v Jackson* [1977] QB 966 at 987). The other consideration is that an injunction, a remedy commonly sought in a nuisance claim in order to prevent it from continuing, is discretionary, and therefore even if a court finds that there has been a nuisance, it can decide not to award an injunction. These factors need to be kept in mind when examining the application of the law of nuisance to golf.

Golf and the Law of Nuisance

Any ball hit off a golf course will be considered by the rules of the game to be out of bounds, usually involving an automatic one shot penalty. However, it can also lead to potential legal action. In *Lester-Travers v City of Frankston* [1970] VR 2, for instance, the plaintiff owned property adjacent to a council owned golf course and sometimes balls would stray onto her land, endangering anyone on the property, or causing minor damage to the house. The plaintiff had brought the property in 1944, seven years after the golf course had been built, and the number of balls reaching her land began to increase after an open drain was covered over, and foliage

was reduced in the area of the course closest to her land. During a 12 month period, from August 1968 to August 1969, the plaintiff collected a total of 36 golf balls from her land which were produced as evidence in court. Justice Anderson held, at 11, that the plaintiff had suffered ‘a substantial diminution in the comfort and healthful enjoyment of the premises occupied by her’ (*Lester-Travers v City of Frankston* [1970] VR 2 at 11). His Honour considered the damage or inconvenience she suffered was not ‘sentimental, speculative or trifling’, nor was it ‘temporary, fleeting or evanescent,’ but on the contrary, it was ‘substantial and serious.’ It was also held by Justice Anderson’s that the intrusion was also preventable by allowing foliage to regrow in the appropriate area, and also by the club building suitable protective screens (*Lester-Travers v City of Frankston* [1970] VR 2 at 15). An injunction was therefore granted preventing golfers from playing on the two offending holes until such screens were erected.

In *Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214, meanwhile, the plaintiff, Champagne Views, a development company, acquired 60 lots of subdivided land at a golfing resort, Cape Schanck Resort. Champagne Views then began building five units near the 15th hole. During the building process, however, balls were hit into the area from the 15th tee, with many golfers trespassing onto the land to recover their balls. Champagne Views then took legal action for nuisance. Remedial work in the form of lowering the 15th tee and building an embankment did rectify the problem before it actually reached a full trial. However, it was held that there had been a nuisance, which is why costs were awarded in favour of the plaintiff (*Champagne View Pty Ltd v Shearwater Resort Management Pty Ltd* [2000] VSC 214 at [107]). Similarly, in *Campbelltown Golf Club Ltd v Winton* (Unreported, NSW Supreme Court, 23 June 1998) residential buildings were built on land surrounding a golf course with it being held the golf club needed to adjust its activities so as not to unreasonably interfere with the peaceful enjoyment of the adjacent land. It was also held this could be obtained by resetting the direction of the hole, the use of screens, or a combination of both.

Challen v The McLeod Country Golf Club [2004] QCA 358 involved a situation where the Challens had purchased land next to the 12th hole of the golf course in 1988. During the 1990s the number of balls coming onto the property increased, causing damage to roof tiles and

breaking windows. In 2001 alone, 526 balls were collected from the property. The Challens wrote numerous letters to the golf club, though the club took the stance it was the individual players who were liable. Eventually, however, the club agreed to redesign the 12th hole by moving the tee forward, thus changing the par 4 into a shorter par 3. This reduced the likelihood of a mishit tee shot while trees were also planted to act as a barrier. However, a few balls still regularly came onto the property.

At the trial it was held, at [35], that if an occupier of land allows a nuisance to be conducted on its land, once it becomes aware of it, it becomes liable for the consequences of that nuisance (*Challen v The McLeod Country Golf Club* [2004] QCA 358 at [35]). It was also held that even two or three balls per week regularly coming onto the appellant's property with a risk of physical harm or damage to persons or property on the appellant's premises, is a material interference with the enjoyment of the appellant of her property. *Challen v The McLeod Country Golf Club* [2004] QCA 358 at [39]). Damages of \$12,000 were therefore awarded to the Challens.

While most of the golf nuisance cases have involved golf courses, it is possible that balls being hit at a driving range can create a nuisance. In *Chapman v Plenty Views Pty Ltd* [2009] VCC 1271, for instance, golf balls were being struck onto a residential property from an adjacent driving range, with an estimated 20,000 balls being collected. An injunction was therefore granted to prevent the golf range being used in a way that permitted the entry of golf balls onto the plaintiff's property *Chapman v Plenty Views Pty Ltd* [2009] VCC 1271 at [109]). Damages of \$15,000 were also awarded.

Thus, what the cases establish is that if golf balls are hit off a golf course, once the club becomes aware of this, it is liable in nuisance. What will now be discussed is what can be done to try and prevent the nuisance from occurring.

Preventing A Nuisance

Whenever a golf course is being designed, possible problems with balls being mishit off the course need to be considered, and factored into the design. The first consideration should be the length of the holes along the perimeter of the course, and if there are potential problems, one solution is to have shorter holes as the longer the hole, the greater the chance of a mishit shot. The reason for this is that longer clubs have to be used which means, firstly, a mishit is more likely since longer clubs are harder to control, and, secondly, the fact as the ball is hit further, any mishit will go further and be more likely to cause a nuisance. The impact of mishit balls can be limited by the creation of barriers, natural ones, like trees and earth mounds, and artificial ones, such as screens. These remedies can also provide the solution for an already established course if, for example, a new housing estate is built next to the course. In most cases, probably the first approach should be to put natural or artificial barriers, or a combination of the two. However, if this is not effective in preventing the nuisance, then a redesign of the offending holes will need to be carried out.

Golf balls being hit onto housing developments involves a private nuisance, but it is possible that the balls may stray onto a nearby road and therefore create a public nuisance. If the road is a major arterial road, then this may create a dangerous situation for passing vehicles. Warringah Golf Course on Sydney's Northern Beaches, for instance, was built in 1935, at a time when there was little traffic on the roads running along its eastern and western perimeters. This dramatically changed over the ensuing decades, and on the western side, Condamine Street is now a major, multi-lane road providing transport links to and from the city. The original design had two par fives along this western perimeter, and despite the putting up of screens, mishit shots became a significant problem. The solution therefore was to redesign the course so that shorter par threes and par fours ran along the perimeter, with new par fives being created in the middle of the course, safely away from the traffic.

CONCLUSION

Golf is a game enjoyed by millions of people all over the world. For the vast majority of the time there are no problems with how it is played. However, all golfers should be aware that they do owe a duty of care to their fellow competitors, and may be liable in negligence if they injure a fellow golfer, particularly if it involves hitting someone in the group ahead on the same hole. Golf clubs, on the other hand, need to be aware that once they became aware golf balls are being hit onto adjacent properties, they may be liable in nuisance for any damage. If a nuisance is present then the club needs to look at suitable remedies, such as building barriers, or look at redesigning that area of the course.

REFERENCES

- Davies, C, 'Golf: A Beautiful or Dangerous Game?' (2010) 6 *Malaysian Journal of Sport Science and Recreation* 21.
- Thorpe, D, A. Buti, C. Davies and P. Jonson, *Sports Law*, Oxford University Press, 3rd Edition, 2017.