INJURY BY A GOLF BALL A CASE OF NEGLIGENCE HORTON v JACKSON & BEZANT

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In the July 1995 issue of the GCM journal I dealt with the fictitious case of Nuisance in the saga of Hacking Golf Club. There has now been a recent, true and tragic case, which was held at the Queen Elizabeth II Courts in Liverpool.

The presiding Judge was His Honour, Judge Ian Trigger, and I am grateful to him for allowing me access to a copy of his judgement in the case. I am also grateful to Weightman Rutherfords of Liverpool, solicitors for the first defendant in the case, for providing me with a copy of the judgement.

The Facts

On 29th April 1992 a veterans' match was taking place between Maldon GC, the hosts and Burnham on Crouch GC, the visitors. The match was a fourball better ball competition. Both Plaintiff, Mr Norton, and first defendant, Mr Jackson, are members of Burnham on Crouch GC. Mr Bezant is the Secretary of Maldon GC and is entered in the case as a representative of all the members of that club.

Maldon golf course is a nine hole course and each hole is played twice to make up the eighteen holes. Thus the greens double up for two holes, although the tee position differs depending on whether the hole is being played in the first nine or second nine. Maldon is a very tight course, consisting of about 57 acres and wedged between a canal and a river. In this type of competition there will be several starting points but each fourball will play 18 holes.

The 6th hole of the course also serves as the 15th. The tee positions of the 6th and 15th holes differ - the 6th being nearer the green than the 15th. The 6th hole has a distance of 295 yards and the 15th a distance of 342 yards.

On the day in question the Plaintiff, Horton was partnered by Mr Murphy and had approached the 15th tee. (Since the green served the 6th and 15th holes, reference will be made only to the 6th green in future). The Plaintiff's drive took him up the left side of the fairway and the other three players went up the middle or to the right. The Plaintiff played his second shot to the 6th green from the left, but was not sure whether his shot had gone over the moat, which came into play at this hole. The players then had to cross a bridge over the moat onto the green. The bridge is in line with the usual or expected drive from the 9th tee. The 9th tee is, at its nearest point only

10 yards away from the 6th green. Players leaving the 6th green to the 7th tee have to walk right across the front of the 9th tee. The Plaintiff saw the first defendant and the others in his group in the vicinity of the 9th tee as he crossed the bridge.

In the game involving the Plaintiff, his partner indicated to him where his ball had landed on the left hand fringe - approximately two or three yards from the edge of the green. The Plaintiff played his shot and was then struck by a ball driven by the first Defendant from the 9th tee and lost all vision in his left eye.

The Plaintiff brings the case in negligence against both Defendants and breach of statutory duty under the Occupiers' Liability Act 1957 against the second Defendants.

The Defences raised by the First Defendant

1. **Volenti non fit Injuria**
   This is a defence which claims that the victim willingly accepted the risks which resulted in the injury.

   Counsel for the first Defendant claimed that the action should fail, because this was a sporting occasion and referred to the Appeal decision in Condon v Basi (1985 1WLR 866) where a bad tackle by the defendant broke the Plaintiff's leg. In his judgement, the Master of the Rolls stated that people in competitive sports owed each other a duty of care to take all reasonable care in the particular circumstances and that it cannot be said that because a breach of the rules occurs negligence is established.

2. **Contributory Negligence**
   This is a partial defence that the injured party in some way contributed to the injury and this should be taken into account in any award of damages.

The Judgement on the First Defendant

His Honour, Judge Trigger, stated that he was satisfied that the Plaintiff's ball had landed as photographs showed and that as he was crossing the bridge and making a right hand turn that no-one on the 9th tee was addressing the ball or preparing to tee up

The judge was also satisfied that the Plaintiff was keeping a look-out and reasonably assumed that no-one was about to drive off from the 9th tee there and then.

The judge was also satisfied that when the Plaintiff played his third shot from the fringe he was approximately two or three yards from the edge of the green and was then in full view of anyone standing on any part of the 9th tee who was looking in that direction.

The Defendant and his group were in the vicinity of the 9th tee as the Plaintiff walked up the 6th fairway towards the moat of the 6th hole.

The Judge was satisfied that the Defendant had placed a tee peg some yards back from the very front of the 9th tee and placed a ball on the tee. (The 9th hole is 370 yards long and is a dog leg

to the left. The preferable line is to aim the ball well away from the 6th green and to aim just left of the Clubhouse.)

Having positioned his ball on the tee, the Defendant had to wait, because he was aware of golfers moving from the 6th green to the 7th tee. Because the Defendant is right handed, he would be looking to his right and the Plaintiff would be to the Defendant's left. Once the golfers had reached the sanctuary of the 7th tee, the Defendant gave a glance to his left and failed to notice the Plaintiff to his left. If he had given a proper look, the Defendant would have seen the Plaintiff. He then struck his ball on the intended, or virtually intended, line of play. The Defendant deliberately played his shot well to the left of the Clubhouse, because he had a tendency to slice. In doing this he struck his ball to where, unbeknown to him, the Plaintiff was standing.

Judge Trigger stated that he had to look at the particular findings of fact and the precise sequence of events.

The Judge took into account that the Defendant knew that his intended drive was to go near the apron of the 6th green. This meant that the Defendant had to look "with particular vigour" in that vicinity before driving. If he had done so, he would have seen the Plaintiff and that the Plaintiff was standing in the direct line of his intended direction. He would then have waited for the Plaintiff to complete his shot and clear the area before driving. Mr Butcher, a member of the group playing with the Defendant, saw the Plaintiff clearly and saw the Defendant approach his ball and assumed that he was going to take a practice swing because of the position of the Plaintiff and the proximity of the 9th tee. Mr Butcher stated that he was amazed when the Defendant struck the ball.

The Judge referred to Lewis v Buckpool Golf Club (1993 Scottish Law Times), in which the Plaintiff was struck by a mishit golf ball from a nearby tee. It was held that there was a real risk as distinct from a mere possibility, that the driver might have mishit the ball and that any mishit ball would cause injury to players on the adjacent green, and that in driving that way from the tee, the driver was negligent. This case fortified the Judge in the conclusion that the Defendant was negligent in driving when he was unaware through his own failure to take proper stock of the position of the Plaintiff.

There was also a notice on the 9th tee near to trees which had been put there to protect people on the 9th tee and the 6th green from each other, which read "Players putting on the 6th/15th green have priority." The Judge then referred to Rule 1 of the Rules of Golf promulgated by the R&A, which stressed the need for care and vigilance before striking a golf ball.

The Judge then referred to Mr Butcher's evidence that earlier in the round (this was the second time that the Defendant had played on the 6th green) Mr Butcher had orally warned the Defendant that there was a danger to players when he, the Defendant, came to play the 9th tee.

The Judge found no contributory negligence on the part of the Plaintiff. The Plaintiff was aware of the presence of people in the vicinity of the 9th tee as he was crossing the moat and none were

preparing to hit the ball from the tee, because they were aware of people crossing from the 6th green to the 7th tee. The Plaintiff was perfectly entitled to go to where his ball was and he remained, or ought to have remained, in sight of the people on the 9th tee, but in particular the Defendant.

The Plaintiff had no reason to acknowledge his presence to the first Defendant, because he had no reason to suspect that the Defendant was about to strike his golf ball in the Plaintiff's direction.

The allegations of contributory negligence contained in the defence were not made out and no reduction of damages would be made.

The Defence raised by the Second Defendants

Both the Plaintiff and the first Defendant claimed that the second Defendants were negligent by being in breach of their statutory duty under the Occupiers' Liability Acts.

(A short history of the course will help.) About 1976 the 6th green was moved about 50 yards nearer to the 9th tee. At that time the Defendants realised that there was a danger to people in the vicinity of the 9th tee and the 6th green. A barrier of trees was erected. This line of trees is now some yards from the end of the 9th tee.

Trees stretching to the end of the 9th tee would have provided some protection for the Plaintiff, because they would have caused the driver from the 9th tee to steer his ball away from them.

The Counsels for the Plaintiff and the first Defendant argued that the Defendants ought to have heeded the risk of injury because of previous accidents at this spot and taken steps to guard against it. Both Counsels argued that even without the accidents, the risk of injury should have been apparent and guarded against.

The Defendants, when they knew of the accidents should have consulted architects, who would have recommended the extension of the screening on the 9th tee. Further, a better system of priority could have been arranged and the sign to which the judge has already referred was not suitable.

The Judgement on the Second Defendants

The Judge stated that he had received evidence of three previous accidents at this spot. The accident was not officially reported to the Secretary and there was no proper system of reporting such accidents.

The Judge then referred to expert evidence. Mr Paul Thomas, a course architect stated that he could see no reason why the screen to the left of the 9th tee should not be extended. It may have a detrimental effect on the 9th hole, but he was willing to sacrifice aesthetics for safety. Mr Heggerty, a golfing professional and latter day course architect, stated that the line of trees to the left of the 9th tee should have been extended without any impairment to the hole. He accepted that he had been told that the tee markers on the day in question were behind the tree line. It was

also put to him that the extension of the tree line might have meant that insufficient notice would have been taken of people moving from the 6th green to the 7th tee. He accepted this but said that these people would be easily heard.

Dr David Marsh, a distinguished amateur golfer and former Chairman of the R&A Rules Committee, stated that the extension of the tree line could cause more problems than it solved. The Judge agreed with Dr Marsh that the number of accidents over the period of years was a small risk.

The Judge continued that he found it problematical as to whether the implementing of the extension of trees or a different system of priority would have stopped this particular accident, which was caused by a simple lack of concentration on people in a different sphere of vision.

The Judge again agreed with Dr Marsh that, if there was an extension to the tree line, there was a probability that drivers from the 9th tee would use a wider angle, which would have brought the Plaintiff not just into view but more importantly into the line of fire.

The Judge concluded that for the above reasons there was no liability which attached to the second Defendants and the allegations of negligence and breach of duty had not been proved on the balance of probabilities. It had not been established that any of the suggested safety features would have prevented an incident of this type happening.

Judgement was given for the Plaintiff in the sum of £24,000.

After legal argument the Judge decided that the costs of the Plaintiff and the second Defendant should be paid by the first Defendant.

Both Defendants have accepted the ruling concerning the Plaintiff with the result that he will receive the award.

I understand that there is to be an appeal concerning the position of the two Defendants, which will be heard in or about October. The Appeal Court will make the position of the golf club clearer.

The Implications of the Case

There are several implications for Golf Clubs in this case to be considered:-

1. The need for every golfer and every Club to be insured adequately. Most golfers' personal insurance policies usually cover third party liability up to £1,000,000.

   It should be a policy of the Club and possibly inserted in the byelaws that each member is insured.

   I would go even further and include the insurance premium in the subscription. This could have a beneficial effect for Club and members in that the insurance companies may

give some form of commission to the Club and also reduce its premium for members, where the insurance is compulsory. Members who have this insurance would simply transfer at subscription time to the Club's insurance arrangement.

I would also ensure that the members' insurance company is different from the Club's insurance company.

2. It is important for the injured party to remember that, if a court case is the outcome of the injury, the case will be brought on an allegation of negligence and the Plaintiff will have to show three things:-
   a) that there was an injury
   b) that the injury could have been reasonably foreseen.
   c) that the injury could have been reasonably avoided.

   NB: *It is worth noting that the test of reasonableness is that of what the ordinary man would consider reasonable in all the circumstances. One Judge defined the reasonable man "as the man on the Clapham omnibus".*

If his Honour, Judge Trigger, had not decided that Mr Jackson should have looked vigorously to his left before hitting the ball, it is possible that Horton would have failed. The result would have been that he could have had to pay the costs of both Defendants.

3. Golf Clubs must be more diligent in the posting of warning notices. Most Clubs have changed holes over the past few years and it is possible that these changes have brought about risks of injury to players. If the Club has not taken reasonable care to ensure that these risks are reasonably eliminated or minimised, then it will be found negligent and in breach of its statutory duty.

   The Club must be aware that its duty under the Occupiers' Liability Acts to both lawful visitors and trespassers is ever present. Thus, if warning notices are vandalised, the Club has a duty to replace these notices immediately. Similarly, the careful Club will ensure that warning notices announcing that there is poison on the green are placed at entry points where the public is liable to enter the course, whether these entry points are rights of way or where trespassers may enter.

4. It must be remembered that insurance companies' policies are to protect the transgressor and not the injured party.

APPEAL BY MR JACKSON

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This appeal was heard in the Royal Courts of Justice in the Strand, London with Lord Justice Butler Sloss and Mr Justice Douglas Brown presiding.

To recap... Mr Justice Trigger in the court of first instance found in favour of the plaintiff, Mr Horton, that he was injured through the negligence of the first defendant, Mr Jackson, and was awarded £24,000 damages for loss of the sight in one eye and that the first defendant had to pay his own costs and those of the second defendant, in effect the golf club.

The appeal was made on the grounds that the second defendant was more negligent than the first defendant and should have paid part of the compensation of £24,000 and its own costs.

Judge's Summing Up At Court of First Instance

The Judge at first instance summarised the views of two experts, Messrs Thomas and Heggarty. Both were critical of the club and see no reason why the trees should not be continued to the front of the tee.

Dr Marsh, a distinguished amateur golfer and past Chairman of the Rules Committee of the R&A, put the view that extending the trees to the front of the tee would cause as many problems as it would solve.

The Judge found that there was a warning sign in place. He also found that Maldon Golf Club was only aware of two accidents between 1976 and 1992. He agreed with Dr Marsh that the number of accidents over a timetable of years was a fairly low risk. Dr Marsh stated that there were no repeated accidents which would point to danger. Maldon might have about 25,000 rounds of golf played on it in a year, which would mean that there were 50,000 played off the 9th tee of the nine hole course. This would mean about one million shots in a 20 year period and one accident in a million is not repeated accidents.

The Judge concluded "Certainly it has not been established that the addition of any of the suggested safety features would, or might, have prevented an incident of this type occurring in the same way".

Grounds of Appeal

The award of £24,000 damages to Mr Horton was not disputed and he was not represented in the appeal.

Mr Jackson's appeal was based on the following:

1. The appellants (ie, the first defendant at the court of first instance) relied on the evidence of Mr Butcher, a past captain of Maldon, who was in the appellants four ball. Mr Butcher stated that he gave warning to those driving on the 9th tee about players on the 6th green.

This was a normal practice for him, because he regarded it as a dangerous situation. He could not think of any other tee where it was necessary to give this warning. The appellant submitted that not only was this a dangerous situation but that the club (since Mr Butcher was a past officer) knew of the danger.

2. The appellant relied on proved accidents, which were strongly indicative of other accidents at this part of the course and the judge at first instance should have found that it was probable that other incidents had occurred.

3. The club should also have had regard to an Essex County Council's Golf Report, which, in a section on safety states that there should be "30 metres between green and tee". If the club had paid attention to the report it would have extended the tree screen at the 9th tee and established, by a sign, a clear system of priorities. The extension of the tree line was necessary to minimise a known risk.

The Judge, therefore, should have accepted the evidence of all three experts who, with varying degrees of emphasis, had said that the tree screen should have been extended and he was wrong to find that the accident would not have been avoided by these measures.

The appellant no longer challenged that there was a sign at the side of the 9th tee giving priority to those on the 6th green, but he submitted that the injunction in the notice was not observed. He submitted that it was not sufficient for the club to erect a sign but they had to ensure that it was obeyed and followed by all who played the course.

Appeal Court Judgement

The Judge at first instance had based his approach on the first Rule of Golf, " prior to playing a stroke or making a practice swing, the player should ensure that no one is standing close by or in a position to be hit ... ".

The injured party, in this instance, would still have been in danger from a player who did not pay any attention to who was in the way of his shot.

The appeal Court found that the judge was correct in this decision. The judge at first instance was entitled to accept Dr Marsh's evidence where it differed from the other two experts.

The judge at first instance was also right to find that there had been only two proven incidents before this accident at this part of the course in the previous 16 years.

Section 2 of the Occupiers Liability Act 1957 states in subsection 2:

> **"A common duty of care is a duty to take such care that in all the circumstances of the case is reasonable to see that the visitor would be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there".**

The "circumstances of the case" includes the overwhelming number of times that the 6th green and the 9th tee have been safely negotiated since 1976. It would have been wrong of the judge at first instance to speculate on the number of incidents as suggested by the appellant.

The appellant was critical of the club not having an accident book until 1990 and was then critical of the club for not putting any incidents in until this accident in 1992. The fact that there were no reported incidents for four years strongly supports the case that there were very few incidents with an enormous amount of rounds played.

The committee had taken safety measures by erecting a screen and putting up a notice giving priority.

There is a limit in reasonableness to the number of steps a golf club can take to protect players. It is not reasonable to require a golf club to erect a sign to tell a golfer he must not aim a drive at a person standing or walking 25 yards away from him who is in plain view.

This accident was caused by the incomprehensible and wholly unexpected action of Mr Jackson in driving when Mr Horton was so close on the line of his drive. It is an elementary precaution for a golfer driving to look just before beginning his swing to see if anyone is in, or moving into, a dangerous position. Mr Jackson was so intent on playing his shot and, for some reason, playing it quickly that he simply did not look and on his own evidence was not aware of the presence of Mr Horton until after the ball had struck him.

No steps taken by the club could have prevented this accident. There was no duty on the club to extend the screen or to alter any sign at the hole. It is unlikely that if either step had been taken it would have prevented this accident. The evidence up to date of the accident showed that there was nothing else the club could do in the state of its knowledge as to this part of the course.

The appeal, therefore, failed.

Summing Up

There is one important expression in this judgement....."in all the circumstances of the case".

It would be folly for a golf club to think that because of erecting a line of trees or a fence and a warning notice, it is safe from prosecution. It is important to remember the duty of care as expressed by the Occupiers Liability Act is ever present. If there are such screens and notices in dangerous areas of the course, these screens and notices must be maintained in a proper and good condition.

It may be that there are other areas which now present a danger and these must be attended to.

The accident book is essential, particularly under the Health and Safety at Work Act. Remember that all accidents must be recorded and where there is a hospital case, the hospital may report the accident to the Health and Safety Executive but must report it, if the patient is kept in hospital for more than 24 hours.

It would be wise to ensure that all members have a third party liability policy. I suggested this in my previous article on this case.

It may also be advisable to have a notice of first Rule of Golf of the R&A at the first tee.

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