Fore! Who Is Liable On A Golf Course

By Douglas M. Lieberman, P.C.*

It is the middle of winter and thoughts wander to those beautiful spring and summer days when time can be spent on the golf course. The distinctive sound of the club hitting the ball. Watching the ball in flight. Seeing it hook and landing a few feet from a player standing on the adjacent fairway. It makes one wonder - is there liability for hitting another golfer with a ball during a round of golf?

New York follows the general rule that a participant in a sport, by reason of that participation, has consented to those injury causing events which are known, apparent or reasonably foreseeable consequences of such participation. In the seminal case of *Turcotte v. Fell*, 68 N.Y.2d 432, 510 N.Y.S.2d 49 (1986), jockey Ron Turcotte sued fellow jockey Jeffrey Fell and others to recover for injuries suffered during a race at Belmont Park. The horse Turcotte was riding clipped the heels of Fell's horse, causing Turcotte's horse to trip and fall, throwing Turcotte to the ground and causing him severe personal injuries that made him a paraplegic. *Id*. at 436, 510 N.Y.S.2d at 51. The Court of Appeals analyzed the assumption of risk doctrine in light of the comparative negligence statute and found that Turcotte, by his participation in the race, consented to those acts which were part of a horse race. Though such consent would not be for reckless or intentional acts outside the scope of the sport, the act which led to Turcotte's injury did not rise to such a level. *Id*. at 439-41, 510 N.Y.S.2d at 53-55. The fact that Turcotte was a professional jockey made him more aware of the dangers inherent in the sport and made him more willing to accept those dangers in exchange for being paid. *Id*. at 440, 510 N.Y.S.2d at 54.

On a golf course, a golfer generally has a duty of reasonable care to avoid injury to others. *See, Jackson v. Livingston Country Club, Inc.*, 55 A.D.2d 1045, 391 N.Y.S.2d 234 (4th Dept. 1977). As a result, a golfer hitting his shot has a duty to timely yell "fore" so as to give warning to those persons in the "foreseeable ambit of danger". *Jenks v. McGranaghan*, 30 N.Y.2d 475, 479, 334 N.Y.S.2d 641, 643 (1972); Nussbaum v. Lacopo, 27 N.Y.2d 311, 317 N.Y.S.2d 347 (1970); *see, also, McDonald v. Huntington Crescent Club, Inc.*, 152 A.D.2d 543, 543 N.Y.S.2d 155 (2d Dept. 1989) (summary judgment in favor of golfer precluded in action by caddie who was struck by ball while standing in intended line of flight of ball and issue existed whether player yelled "fore"). This duty, however, does not extend to someone not in the line of play (though there is not a mathematical equation to determine whether one is in the line of play) or who is on a contiguous hole or fairway. *See, Jenks, supra; Nussbaum, supra; Noe v. Park Country Club of Buffalo*, 115 A.D.2d 230, 495 N.Y.S.2d 846 (4th Dept. 1985);*Turel v. Milberg*, 10 Misc.2d 141, 169 N.Y.S.2d 955 (App. Term 1957). Additionally, a golfer does not exculpate careless or reckless conduct simply by yelling "fore." See, Neumann v. Shlansky, 58 Misc.2d 128, 294 N.Y.S.2d 628 (Co. Ct. Westchester Co 1968), aff'd, 63 Misc.2d 587, 312 N.Y.S.2d 951 (App.Term 1970), aff'd, 36 A.D.2d 540, 318 N.Y.S.2d 925 (2d Dept. 1971).

The Fourth Department in Jackson, supra, reversed summary judgment granted in favor of a golfer when there was conflicting proof as to what happened. On a par three hole for which the course rule was to allow the group behind to hit up, the defendant hit his tee shot before being waved up and without warning, though plaintiff walked to the back and away from the green. Plaintiff was walking when struck by defendant's shot. According to the court, a jury could find defendant negligent on these facts as a result of the general duty of care a golfer has to avoid injury to others, which may include

giving a warning. The Court further found that though a golfer generally assumes the risks inherent in the sport, he does not assume the risk of another's golfer's negligence which enhances the risk. *Id.*

In *Jenks, supra*, plaintiff commenced an action to recover for personal injuries sustained when he was hit in the eye by a golf ball. At the time of the incident, the defendant was teeing off on the eighth tee and plaintiff's group was teeing off on the ninth tee, which was located adjacent to the eighth fairway. A mesh fence protected a portion of the ninth tee. At the time defendant teed off, plaintiff walked out from behind the mesh fence. There was no advance warning of defendant's intention to drive, though when the shot began to hook, members of defendant's group shouted "fore," which plaintiff did not hear. The drive hooked to the left, striking plaintiff in the eye. Id. at 478, 334 N.Y.S.2d at 642. Plaintiff argued that defendant was negligent in not giving notice of his intent to drive. The court held that, given plaintiff's location, he was not in the zone of danger and, therefore, defendant had no duty to warn before hitting. *Id*. at 480, 334 N.Y.S.2d at 644. "The mere fact that a ball does not travel the intended course does not establish negligence." *Id*. at 479, 334 N.Y.S.2d at 643.

The defendant golfer in Nussbaum, supra, was a trespasser on a golf course whose shot hooked and hit plaintiff while plaintiff was on his patio at his house, which was situated on land abutting one of the holes at the golf course. *Id.* at 314, 317 N.Y.S.2d 349-50. The claim made against the golfer was for failure to give a warning. The Court of Appeals affirmed the lower court ruling that defendant was not liable. Any warning which the defendant might have given would not have been directed at defendant. Moreover, given the layout of the particular hole, it was not foreseeable that a ball would land in plaintiff's backyard. *Id*. at 319, 317 N.Y.S.2d at 354.

The Second Department in *Defonce v K.S.B. Arrowwood Realty Corp.*, 207 A.D.2d 427, 615 N.Y.S.2d 87 (2d Dept. 1994), held that the lower court should have granted a golfer summary judgment in an action brought against him by a golf course employee for injuries allegedly sustained when a ball hit by the golfer "sliced" away from the fairway and struck the employee, since the employee concededly was not within the intended line of flight of the ball and admitted that he was watching the golfer when the golfer was swinging, so that golfer's shouting of "fore" would not have made a difference. The golfer could not be held liable merely because his ball "sliced."

Neither choice of club nor size of the group playing, without more, will lead to liability. In *Povanda v. Powers*, 152 Misc. 75, 272 N.Y.S. 619 (Sup.Ct. N.Y.Co. 1934), a caddie struck by a ball argued that the defendant was negligent in using a driver from the rough and by playing in a group of seven. The court held that neither the choice of club nor playing in a group of seven was negligent. The defendant was negligent, however, by failing to yell out prior to his shot. "A golf ball is ordinarily a harmless thing. When it is struck a hard blow by a golf club, it assumes the nature of a dangerous missile." *Id*. at 78, 272 N.Y.S. at 623.

A poorly hit shot, in and of itself, does not give rise to liability without affirmative evidence that the player failed to exercise due care. Indeed, not only is the risk of errant golf shots inherent in the sport [*see, Rinaldo v. McGovern*, 78 N.Y.2d 729, 579 N.Y.S.2d 626 (1991); Rabinowitz v. *Roland Stafford Golf School*, 157 Misc.2d 458, 596 N.Y.S.2d 991 (Sup. Ct. Delaware Co. 1993)], but the very uncertainty of where the golf ball is going to go once it is hit is what makes the game intriguing and undoubtedly a factor that has led to its popularity.*Neumann, supra*, at 130, 294 N.Y.S.2d at 632, *citing, Povanda, supra*, at 78, 272 N.Y.S. at 622.

In *Rinaldo, supra*, the defendants' each sliced their tee shots, causing their balls to sail off of the golf course, over (or through) a screen of trees and into an adjacent public road. Plaintiff was traveling in her vehicle at that time and one of the

balls struck and shattered her windshield, causing personal injuries. As a golfer generally will not be liable to someone outside the boundaries of the golf course as a result of a mishit ball (*see, Nussbaum, supra*) and as, under the circumstances, a warning would have been futile, the defendant was not negligent. "To provide an actionable theory of liability, a person injured by a mishit golf ball must affirmatively show that the golfer failed to exercise due care by adducing proof, for example, that the golfer 'aimed so inaccurately as to unreasonably increase the risk of harm.'" *Rinaldo* at 733, 579 N.Y.S.2d at 629, citing, Nussbaum, supra at 319, 317 N.Y.S.2d at 353. The plaintiff failed to adduce any such proof. But, see, Gleason v. Hillcrest Golf Course, 148 Misc. 246, 265 N.Y.S. 886 (Mun. Ct. Queens Co. 1933)(golfer held jointly and severally liable with golf course for his "sliced" shot which went over six foot fence onto highway, striking car windshield and injuring plaintiff).

As can be seen, golfers assume the risks inherent in the game when they step onto a course. Errant shots, in and of themselves, do not give rise to liability. So long as the golfer met his duty to warn those in the intended line of flight of the ball and he was not careless or reckless in taking his shot, the golfer will not be held liable for injuries which may result from that shot.

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