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Torts -- Liability of Golf Courses to Invitees

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negligence, or (2) he was never in any "apparent peril" or (3) both.

One may or may not agree with the wisdom and ultimate justice of refusing to apply the last clear chance doctrine in these situations, but one cannot deny that these rules are clearer and more tangible than the blank statement that plaintiff as been guilty of contributory negligence as a matter of law. Why, then, does the court insist upon using this phrase, which explains nothing and succeeds only in creating an aura of mystery about the entire decision?

This note does not purport to analyze trends in the North Carolina law of negligence, but more exhaustive and general research might well reveal that the confusion in this area heralds a general reaction against the doctrine of last clear chance and a tendency on the part of the North Carolina court to apply it more sparingly.

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Torts—Liability of Golf Courses to Invitees

In a recent North Carolina case, the court moved a step closer to defining the liability of a golf course for accidents which occur on its premises.[1] In affirming the non suit granted by the lower court, the court held that the defendant golf course was under no duty to guard against possible injury to patrons by reason of the maintenance of the water hole which caused the plaintiff's injury and that the plaintiff's evidence clearly indicated that he was contributorily negligent, which barred his recovery as a matter of law.[2]

In its discussion of the situation, the court placed the golf course in the general category of places of amusement and the golfer in the general category of invitee. As was correctly stated in the principal case, the general rule is that the owner of a place of amusement "is not an insurer of the safety of patrons, but owes them only what, under particular circumstances, is 'ordinary' or 'reasonable' care."[3]

[1] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 81 S. E. 2d 375 (1954). Plaintiff was playing golf on a course owned by defendants. After finishing the ninth hole, he placed his caddie cart several feet away from a path leading to the tenth tee. He drove his ball from the tee and returned to get his cart. After getting the cart, he was injured when he stepped into an open terra cotta hole which was used by the defendants in connection with watering the greens. The hole was normally covered, and there was evidence to show that it had been uncovered for 30 to 50 days prior to the accident. The court granted the defendant's motion for non-suit.

[2] Other jurisdictions have reached a similar result in similar situations by application of the doctrine of assumption of risk. See: Young v. Roass, 127 N. J. L. 211, 21 A. 2d 762 (1941); Schlenger v. Weinberg, 107 N. J. L. 130, 150 Atl. 434 (1930); Kavafian v. Seattle Baseball Club, 105 Wash. 215, 181 Pac. 679 (1919); Note, 32 N. C. L. REV. 366 (1954).

[3] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 163, 81 S. E. 2d 375, 378 (1954). See also: Boucher v. Paramount-Richards Theaters, 30 So. 2d 211 (La. Ct. App. 1947); Modec v. City of Eveleth, 224 Minn. 556, 29 N. W. 2d 453 (1947); Revis v. Orr, 234 N. C. 158, 66 S. E. 2d 652 (1952); Patterson v. City of Lexing-

In quoting from an earlier case,[4] the court gave this rule of liability: "The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries to be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed."[5] This seems to be the accepted rule in North Carolina[6] as well as in other states.[7]

Although there have been several decided cases in North Carolina dealing with injuries to golfers, there has been no definite statement by the court as to what the legal rights of a golfer are in relation to the golf course owner. According to this case and the Restatement of Torts,[8] it would seem that a fee-paying golfer playing on a golf course would be a "business invitee" of the golf course. In relation to the distinction between an "invitee" and a mere "licensee," it has been held that in North Carolina, in order "to constitute one an invitee of the other, there must be some mutuality of interest. Usually an invitation will be inferred where the visit is of interest or mutual advantage to the parties, while a license will be inferred where the object is the mere pleasure or benefit of the visitor."[9]

In view of the fact that the business of a golf course is the playing of golf and its chief source of revenue is derived from fees paid by playing golfers, it is natural to conclude that the fee-paying golfer on the premises is a "business invitee" of the golf course. His rights then would be those normally due an invitee on the premises.[10]

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ton, 229 N. C. 637, 50 S. E. 2d 900 (1949); Schentzel v. Philadelphia Nat. League Club, 173 Pa. Super. 179, 96 A. 2d 181 (1953); Peck v. Stanley Co., 335 Pa. 608, 50 A. 2d 306 (1947); Whitfield v. Cox, 189 Va. 219, 52 S. E. 2d 72 (1949).

[4] Smith v. Cumberland Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913).

[5] Farfour v. Golf Club, 240 N. C. 159, 163, 81 S. E. 2d 375, 378 (1954).

[6] Drumwright v. North Carolina Theaters, 228 N. C. 325, 45 S. E. 2d 379 (1947); Ross v. Sterling Drug Store *et al.*, 225 N. C. 226, 34 S. E. 2d 64 (1945); Hiatt v. Ritter, 223 N. C. 262, 25 S. E. 2d 756 (1943); Bowden v. Kress, 198 N. C. 559, 152 S. E. 625 (1930); Smith v. Cumberland Agricultural Society, 163 N. C. 346, 79 S. E. 632 (1913).

[7] Boucher v. Paramount-Richards Theaters, 30 So. 2d 211 (La. Ct. App. 1947); Rouillard v. Canadian Klondike Club, 316 Mass. 11, 54 N. E. 2d 680 (1944); Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N. E. 2d 1 (1936); Modec v. City of Eveleth, 224 Minn. 556, 29 N. W. 2d 453 (1947); McCullough v. Omaha Coliseum Corp., 144 Neb. 92, 12 N. W. 2d 639 (1944); Henry v. Segal, 174 Pa. Super. 313, 101 A. 2d 149 (1953); Denton v. Third Avenue Theater Co., 126 W. Va. 607, 29 S. E. 2d 353 (1944).

[8] RESTATEMENT, TORTS § 32 (1934): "A business visitor is a person who is invited or permitted to enter or remain on land in the possession of another for a purpose directly or indirectly connected with business dealings between them."

[9] Pafford v. Jones Construction Co., 217 N. C. 730, 735, 9 S. E. 2d 408, 411 (1940); *accord,* Atlantic Greyhound Corp. v. Newton, 131 F. 2d 845 (4th Cir. 1942).

[10] Anderson v. Reidsville Amusement Co., 213 N. C. 130, 195 S. E. 386 (1938). *Cf.*, Brooks v. United States, 98 F. Supp. 679 (E. D. N. C. 1951), *affirmed,* 194 F. 2d 185 (4th Cir. 1952); McDonald v. Woolworth Co., 177 F. 2d 401 (4th Cir.

However, the recorded cases where a golf course has been held responsible for accidents occurring on or about its land are few. In one of these cases, the course was held liable for not enforcing safety regulations on its premises, which negligence resulted in a player's being hit by a ball driven by another player.[11] In another situation, a motorist on an adjoining road was injured as a result of a ball's being hit from the golf course.[12] This case was decided against the course because the layout of the premises was such that it was a natural hazard of the game that balls would be hit into the road. In two other cases which involved defects in the premises, the courses were held liable because of these defects. They involved a caddie suffering injuries when a small bridge on which he was standing collapsed,[13] and a boy receiving injuries when he accidentally touched a guy wire leading to an electric power line.[14]

The principal case seems to be the first case on record, certainly the first one in North Carolina, "where a patron of a golf course has sued to recover damages as a result of stepping into any kind of hole on or about a golf course."[15]

However, in one Missouri case, the court held that a spectator at a golf tournament could not recover for injuries sustained when she tripped over a rock concealed by tall grass, in the absence of any showing that the golf course had any previous knowledge of the protruding rock.[16]

1949); Hall v. Holland, 47 So. 2d 889 (Fla. 1950); Price v. Taylor, 302 Ky. 736, 196 S. W. 2d 312 (1946); Revis v. Orr, 234 N. C. 158, 66 S. E. 2d 652 (1952); Barron v. Fuel Co., 159 Pa. Super. 35, 46 A. 2d 506 (1946).

[11] Everett v. Goodwin and Starmount Golf Club Inc., 201 N. C. 734, 161 S. E. 316 (1931). Plaintiff was playing golf on the course owned by the defendant golf course when he was struck by a ball driven by the defendant golfer who had failed to give the customary warning of "fore." The Court held that the defendants were jointly liable. *Contra:* Schlenger v. Weinberg, 107 N. J. L. 130, 150 Atl. 434 (1930).

[12] Gleason v. Hillcrest Golf Course, Inc., 148 N. Y. Misc. 246, 265 N. Y. Supp. 886 (N. Y. Munic. Ct. 1933). Plaintiff was riding in an automobile on a highway adjoining the course operated by the defendant when a ball driven from the course struck and shattered the windshield of the car, injuring the plaintiff. The golf course was held liable. See also: Castle v. St. Augustine's Links, 38 T. L. R. (K. B. 1922) 615.

[13] Claremont County Club v. Industrial Accident Commission, 174 Cal. 395, 163 Pac. 209 (1917). A caddie leaned against the handrail of a bridge spanning a small creek on the golf course owned by the country club. The rail gave away, and the boy fell, sustaining a permanent injury to one of his elbows. The court held the country club liable; *accord,* Low v. City of Gastonia, 211 N. C. 564, 191 S. E. 7 (1937).

[14] Texaco Country Club v. Wade, 163 S. W. 2d 219 (Tex. Civ. App. 1942). The court held that a caddie who went to the defendant country club to seek employment in response to an invitation from the club manager and who placed his hand on a guy wire extending from a light pole and received an electric shock was an "invitee" and that the club was liable for his injuries.

[15] Farfour v. Mimosa Golf Club *et al.,* 240 N. C. 159, 162, 81 S. E. 2d 375, 378 (1954).

[16] Thompson v. Sunset Country Club, 227 S. W. 2d 523 (St. Louis Ct. App., Mo. 1950).

The court seemed to feel that the spectator here was not injured as a result of any unusual danger on the golf course which she could not have anticipated and for which she did not assume the risk. Also, there has been one case in which a patron of an "obstacle" golf course sued for injuries resulting from a fall on a sloping fairway.[17] The owner in this case was not held liable, because this was the type of risk assumed by the patron when he played the game. The Massachusetts court seemed to rule that a patron assumed the risk in a case where the patron, who had used a golf driving range five times previously, was struck by a ball driven by a third person.[18] All three of these situations are easily distinguishable from the principal case in that they do not involve accidents to golfers playing on a regular golf course.

According to the general rules of law in regard to the liability of occupiers of land to invitees on the premises, it would seem that the occupier (in this situation the golf course) could be held liable for injuries sustained by the invitee (golfer) so long as the invitee is reasonably engaged in the furtherance of the business at hand—in this case, playing golf.

The court found in the principal case that the place where the water hole was located was "no part of the terrain designed for playing the game of golf";[19] therefore the defendants were under "no duty to anticipate that patrons would travel in the area of the water hole and to guard against possible injury to them by reason of the hole."[20] By so finding, the court, in effect, ruled that the invitee had gone beyond the range of invitation and had become a mere licensee who had to take the premises as he found them. Had not the court held that the plaintiff had gone beyond the area of the invitation, it appears that the court would have held that the golf course was under a duty to guard against possible injury and, except for the element of contributory negligence, would have been liable for the injuries sustained. This is certainly in accord with the majority of the cases which deal with this problem.

However, this writer feels that the court's limitations of the playing area were too restrictive in view of the nature of the game. Whether a slight deviation for the purpose of placing a caddie cart out of the golfer's way could be considered an act in the furtherance of the game

[17] Young v. Roass, 127 N. J. L. 211, 21 A. 2d 762 (1941). Plaintiff went to an "obstacle" golf course, paid admission fee and began playing. He was subsequently injured when he fell on the seventh fairway on which there was a slope of six inches descending at a 45-degree angle. The court held that there was an "assumption of risk" by the plaintiff and refused recovery for the injuries sustained.

[18] Katz v. Gow, 321 Mass. 666, 75 N. E. 2d 438 (1947).

[19] Farfour v. Mimosa Golf Club *et al.*, 240 N. C. 159, 165, 81 S. E. 2d 375, 380 (1954).

[20] *Id.* at 165, 81 S. E. 2d at 380.

seems to be a question over which reasonable men might differ and rightly a question for the jury.[21]

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Torts—Libel in Will—Publication—Liability of Estate

Where a testator left ten dollars to his grandson and in the will accused him of squandering one thousand dollars, of deserting his mother and the testator by taking sides against him in a lawsuit, and of shirking his duty in World War II, the Oregon Supreme Court held that "an action will lie against the testator's estate for libelous matter contained in a will published after the death of the testator."[1] This decision, because of its rather clear logic, should help to swing the balance toward some degree of certainty in a field which, at the present time, shows little uniformity of result. There are three other decisions in this country in which the same result was reached as in the instant case[2] and three in which liability was denied.[3]

Two of the cases denying recovery do so on the theory that the common law maxim *actio personalis moritur cum persona* applies in these

[21] In affirming the granting of the motion for non suit, the court felt that the evidence was so clear that no other reasonable inference was deducible. Donlop v. Snyder, 234 N. C. 627, 630, 68 S. E. 2d 316, 319 (1951). *Cf.*, Cox v. Railroad, 123 N. C. 604, 607, 31 S. E. 848, 850 (1898): "The plaintiff's evidence must . . . be accepted as true, and construed in the light most favorable for him. . . . It is well settled that if there is more than a scintilla of evidence tending to prove the plaintiff's contention, it must be submitted to the jury, who alone can pass upon the weight of the evidence." See also: Texaco Country Club v. Wade, 163 S. W. 2d 219, 221 (Tex. Civ. App. 1942): "The test of whether one on premises used for public purposes is an invitee at the exact place of injury seems to be whether the owner of the premises ought to have anticipated the member of the public at this point on the premises devoted to public use. It is not essential that the owner should have foreseen the precise injury to any particular individual, but merely that some like injury might, and probably would, result to someone lawfully on the premises. . . . The duty to keep premises safe for invitees does not necessarily apply to the entire premises. It extends to all portions of the premises which are included within the invitation, and which are necessary or convenient for the invitee to use in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated, or which he is allowed to go." *See, e.g.*, Heller v. Select Lake City Operating Co., 187 F. 2d 649 (7th Cir. 1951); Mulford v. Hotel Co., 213 N. C. 603, 197 S. E. 169 (1938); Texas Public Service Co. v. Armstrong, 37 S. W. 2d 294 (Tex. Civ. App. 1931).

[1] Kleinschmidt v. Matthieu, 266 P. 2d 686, 690 (Ore. 1954).

[2] Brown v. Mack, 185 Misc. 368, 56 N. Y. S. 2d 910 (Sup. Ct. 1945); In Matter of Gallagher's Estate, 10 Pa. Dist. 733 (Orphan's Ct. 1901); Harris v. Nashville Trust Co., 128 Tenn. 573, 162 S. W. 584 (1913).

[3] Citizens' and Southern Nat. Bank v. Hendricks, 176 Ga. 692, 168 S. E. 313 (1933), *reversing* Hendricks v. Citizens' and Southern Nat. Bank, 43 Ga. App. 408, 158 S. E. 915 (1931); Nagle v. Nagle, 316 Pa. 507, 175 Atl. 487 (1934); Carver v. Morrow, 213 S. C. 199, 48 S. E. 2d 814 (1948). The *Nagle* case would seem to overrule the decision allowing recovery in Gallagher's Estate, *supra* note 2, not by repudiating the basic theory of the lower court but by carrying the case into the field of privilege.