



PennState
Dickinson Law

DICKINSON LAW REVIEW
PUBLISHED SINCE 1897

Volume 36
Issue 3 *Dickinson Law Review* - Volume 36,
1931-1932

3-1-1932

Injuries on Golf Courses

Alexander Denbo

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Alexander Denbo, *Injuries on Golf Courses*, 36 DICK. L. REV. 183 (1932).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol36/iss3/8>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

defend, it is perfectly clear that the insurance company agrees to perform their covenant of indemnity against loss by assuming the liability and that payment by the insured was not a condition precedent."

The weight of authority construes "to defend" as meaning merely to contest the suit to final judgment. While in a technical sense to defend a suit is to contest it, the words "to defend" also include the broader meaning suggested by the New Hampshire court.

The Pennsylvania court³⁴ says "The insurer has safeguarded its own interest by ascertaining through legal channels that a fair loss has been sustained; by its own conduct at the trial, it is estopped from denying its own liability and cannot prevent the indemnitee from recovering, though the indemnitee's liability has not been discharged by payment." This is not new in the Pennsylvania law, it having been asserted previously.³⁵ Under this theory, the court in the *West* case said, in reference to the "no action" clause, "It is the joker of the policy and has been written out by many legislatures."

We may then conclude that the *West* case does not change the law in Pennsylvania but merely supplies dictum that, if followed in the future, will render a "no action" clause one of indemnity against liability as contrary to indemnity against damages.

The necessity of legislation upon this point is urgent. It should be the duty of the Assembly of Pennsylvania to legislate upon this subject and safeguard this judicious trend set in motion by the two recent cases, as the courts in the future might stay this movement toward advancement.

Adolph D. Weiss.

INJURIES ON GOLF COURSES

The rule seems to be without doubt in Pennsylvania that to maintain an action for damages for an injury

³⁴*West v. MacMillan*, 301 Pa. 344 (1930).

³⁵*Malley v. American Indemnity Ins. Co.*, 297 Pa. 216 (1929).

caused by the alleged negligence of another, there must be a breach of some duty which one party owes to the plaintiff, whereby the latter suffers injury; which injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act.¹ The existence of a duty in any particular case, is to be determined by the reasonable anticipation of a normal man. Thus one is not bound to control his acts with regard to those who can be only *possibly* affected by the manner in which he acts; he owes a duty of care to those only whom the normal man *should foresee* that his lack of care might injure.²

Likewise it has been held that one who voluntarily exposes himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries sustained thereby even though he was in the exercise of ordinary care. This doctrine of "assumption of risk" is said to rest upon, or be in its nature, effect and import, the equivalent at least of the principle expressed by the maxim "*Volenti non fit injuria*", and is to be distinguished from the doctrine of contributory negligence because the former is applicable, even though the person injured was in the exercise of ordinary care.³

The very recent case of *Benjamin v. Nernberg*⁴ presented the question of liability for injury to a fellow player on a golf course. The defendant was relieved on the theory that there was an assumption of risk by the plaintiff. In that case the plaintiff, while standing some forty-eight feet away from the line of flight and where one could not reasonably believe that he was in danger of being struck by a ball driven from the other green, was hit by

¹Hoag v. Railroad, 85 Pa. 293, 298 (1877); Wood v. Pa. R. R., 177 Pa. 306, 35 Atl. 699 (1896); Sturgis v. Kountz, 165 Pa. 364, 30 Atl. 976 (1895); Scott v. R. R., 172 Pa. 646, 33 Atl. 712 (1896).

²Bohlen, Studies in Law of Torts, p. 6. (1926).

³Tomey v. West Penn Rys. Co., 300 Pa. 189 (1930); 45 C. J. 683.

⁴157 Atl. (Pa. Super. Ct.) 10; 79 Pitts. Legal Journal 47 (1931).

a golf ball driven by the defendant when the ball was sliced. It was not until the ball was going directly toward the plaintiff that anyone thought it necessary to shout a warning. The court in refusing recovery said, "If plaintiff was struck by a ball driven by defendant, the plaintiff had assumed, as a matter of law, the risk of injury resulting from his own participation in the game he and all others were then playing."

There appears to be no reason why this case could not have been decided without referring to this theory of assumption of risk. Especially is this true since the court recognized that a golfer when making a shot must give a timely and adequate warning to any persons in the general direction of his drive. Since the plaintiff was not in the line of flight of the ball which the defendant was about to drive, no duty rested on the latter to inform him that a ball was about to be driven. Therefore, since there was no breach of duty on the part of the defendant and the injury not being one which was reasonably foreseeable from his act, he should have been relieved from liability on that ground.⁵

This case does not appear to be in conflict with the case of *Toohy v. Webster*⁶ which held that the plaintiff caddy, although voluntarily present upon the golf links during the playing of the game, did not assume the risk of being struck by a golf ball. The court based its decision on the fact that the defendant failed to give an audible and timely warning in the proper manner before he made his shot, to one to whom harm was reasonably foreseeable from such intended shot.

Thus we see as to fellow players and caddies where there is harm reasonably foreseeable from the shot in question, there is a duty to give an adequate warning of the intended shot. For injury resulting proximately from the failure to perform this duty, liability attaches.

⁵The same principle could be applied to the case of *Andrey v. Sterendon*, 31 *Scotch Law Review* 194, 198 (1906), which is analogous to the instant case.

⁶117 *Atl. (N. J.)* 838 (1922).

The cases discussing the liability to a mere spectator while on the course, entirely disregarded the theory of assumption of risk by such person injured. In the English case of *Cleghan v. Oldham*,⁷ the defendant "followed through" in such a manner that the plaintiff was struck and injured. The defendant testified that she did not look around before making the stroke. The court observed that in all such cases a person must refrain from doing what a reasonable person would not do and if a jury had concluded that a person had done something which a reasonable player in the circumstances would not have done and if injury resulted therefrom, the person is liable in an action for negligence.

Likewise in *Schlenger v. Weinberg*,⁸ the plaintiff went voluntarily to see the links and as his injury was an unforeseen and unusual incident that occurred while he was in the act of realizing his intention, the court considered the injury was not the natural and proximate effect of the failure to give warning either by the "member" or the president of the "club". But where such member knows that the plaintiff might reasonably be expected to be struck, he is under duty to give a warning of the danger to be incurred.⁹

As to the liability for injuries to a passerby on a nearby street, caused by a ball which has been played from the course, there seems to be no dispute. Both the golf club and the player have been held liable for injuries;¹⁰ the club on the theory of the proximity of the course to the highway and the consistent frequency with which balls fell into the highway, which rendered this particular part of the course a nuisance; and the player apparently on the theory that he was negligent in driving while there was someone on the highway who might be injured by a misdirected drive. The liability of both being based on the reasonable foreseeability of harm to persons on the high-

⁷43 Times Law Report 465 (1927).

⁸150 Atl. (N. J.) 434 (1930).

⁹*Biskup v. Hoffman*, 287 S.W. (Mo.) 865.

¹⁰*Castle v. St. Augustine Links*, 33 Times Law Report 615 (1922).

way, it follows that the mere ownership of the golf course would not impute such liability for injury to one struck by a golf ball driven by a player on the course.¹¹

Although the game of golf has been played for many years by hundreds of thousands of our residents, serious accidents have been so few that there is very little precise authority to help the courts.¹² However, if our own conception of the few decided cases is correct, there appears to be no reason for confusing the issues by relieving the defendant from liability on the theory that there was an assumption of risk by the injured party. Liability in all such cases should be sustained only on the ground that there was a breach of some duty which one party owes to another, whereby the latter suffers injury, which was such a consequence as under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to follow from his act. Only where such a breach of duty is found does assumption of risk become involved.

Alexander Denbo.

NOLO CONTENDERE IN PENNSYLVANIA

There has been somewhat of a conflict of authority as to the propriety of the plea of nolo contendere in Pennsylvania where defendant is indicted for any crime which is greater in degree than a misdemeanor.

It is the purpose of the writer to explain herein the purpose of entering such plea and when it may be entered in Pennsylvania so far as the cases have decided. Nolo contendere is synonymous with non vult contendere (third person) and non volo contendere (first person).

"The so-called plea of 'nolo contendere' is not a plea in the strict sense of that term in the criminal law, but a formal declaration by accused that he will not contend with the prosecuting authority under the charge. It is

¹¹Schlenger v. Weinberg, 150 Atl. (N. J.) 434 (1930).

¹²Toohy v. Webster, 117 Atl. (N. J.) 838 (1922).