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Recent Cases

RECENT CASES

TORT — NEGLIGENCE — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — GOLFER — DRIVING BALL WITHOUT WARNING

Is a golfer strictly liable for the safety of other golfers in his foursome? That seems to be the contention of the Pennsylvania Supreme Court in *Getz v. Freed.*[1]

The pertinent facts of the case are as follows. After completing eighteen holes of golf the litigants and two others decided to play a few more holes. The defendant, having the highest score on the eighteenth hole, was the last to drive on the next hole. The defendant "hooked" his first drive over a low stone wall and out of bounds at a spot thirty to thirty-five yards from the tee and thirty feet to the left of the fairway. The defendant then, as is permitted by the rules of golf, hit a second drive which rolled about forty yards from the tee into the fairway. The plaintiff volunteered to look for and recover the defendant's first ball. The defendant turned on the tee as if to walk over to his bag, and the plaintiff walked off the tee to find the defendant's first ball. Just as the plaintiff reached a stone wall which marked the out of bounds line he heard the words, "Look out, Charlie", and was immediately hit on the back of the head by a ball which the defendant had just hit from the tee.

As a defense, it was contended (1) that the plaintiff assumed the risks of the game and (2) that the plaintiff was guilty of contributory negligence in failing to watch alertly for the defendant's next shot. The court refused to charge the jury on these points and the Supreme Court found this not to be error. It is submitted that the defendant was unduly prejudiced by the court's refusal to instruct as to these defenses.

First, however, there must be negligence before there is need for a defense. An interesting case on point is that of *Houston v. Escott.*[2] In that case, the court held that a golfer struck while not standing in the line of play by a ball driven by a player assumed a risk of injury resulting from his own participation and could not recover for injuries against such player. It is doubtful that anyone standing near an out of bounds line a mere thirty-five yards from the tee could be considered to be standing in the line of play. Under this case the defendant certainly would not have been found to be negligent. The court in the principle case said:

> "Defendant was undoubtedly guilty of negligence in driving a third ball when his second drive was in the fairway, and he failed to warn the rest of the foursome of his intention to hit a third drive."[3]

This conclusion that the defendant was negligent is subject to examination. The mere hitting of another ball certainly could not be considered a negligent act.

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1 377 Pa. 480, 105 A.2d 102 (1954).
2 85 F.S. 59, (Del. 1949).
3 See n. 1, supra.

The court said that the defendant violated a rule and custom of the game in hitting this extra ball. The court is only half right with that statement. It is conceded that a rule of the game was violated, but this rule is used merely to speed up the play of the game and is not a rule of safety. Its violation, therefore, cannot be held to be negligence. Where the court said a custom was violated they erred. They evidently failed to consider the "Mulligan Rule" which is an unofficial privilege to hit another ball after hitting a bad shot, whether the ball landed in or out of bounds. This is definitely a violation of a golf rule, but it is in general use among average golfers. There is the failure to warn other players of the next drive as the only possibility for finding negligence.

We now have to consider when a golfer has a duty to warn other golfers that he is about to hit a ball. The court gives us a working standard in rule one of the three generally known golf rules. This rule states that a golfer has a duty to give timely and adequate warning of a shot which he has reasonable grounds to believe may strike another. The word reasonable leaves us with a jury question. From the facts of the case it was shown that the plaintiff was only thirty to thirty-five yards from the tee and approximately thirty feet to the left of the fairway. The average golfer would, I believe, give little thought to hitting a man standing in that position. In fact, that is probably further from the line of proposed flight of the ball than the normal position taken by a caddie. It is customary for a caddie to move out ahead of the tee to a good vantage point whenever there is a danger of losing a ball. Such a position is usually along the edge of the fairway, but under the facts of this case the caddie would most likely sit on the wall which formed the parallel boundary. This would add to his own comfort and give him easy access to any balls hit out of bounds. It has only been since the professional caddies were replaced by school boys during the war years that the bag carriers have started to remain beside the tee while their golfers were teeing off.

It was held in *Benjamin v. Nernberg*[4] that a golfer driving his ball towards the green had no duty to warn a player in another foursome who was not standing in the line of the golfer's play. In that same case it was held that a golfer was not liable for making a poor shot, and that persons playing the game take all of the usual risks that attend it. Surely being hit by a wild shot is one of the usual risks of golf, whether the shot comes from the plaintiff's own group or from another group nearby.

Biskup v. Hoffman[5] held that there was a duty to call a warning to those on the links in the direction of an intended shot, or in the actual course of the ball. The question here is how far from the center of the fairway, which is normally the direction of an intended shot, does this duty to warn extend? In the case of *Alexander v. Wrenn*[6] a person was standing at an angle less than thirty-three degrees from the line of intended flight, and the duty to warn was held to be a jury ques-

4 102 Pa. Super. 471, 157 Atl. 10 (1931).
5 220 Mo. App. 542, 287 S.W. 865 (1926).
6 158 Va. 486, 164 S.E. 715 (1932).

tion. This seems to be an arbitrary figure without merit. The important element to consider is the distance from the tee rather than the angle from the intended line of flight. A solidly hit ball would travel at least twenty-five yards in a straight line before the effects of a hook or slice would become noticeable. After the curve has commenced, the angle from intended flight will rapidly increase with the continued flight of the ball. In other words, for the first twenty-five yards the angle may be only one or two degrees from the intended line while at two hundred yards the angle may have increased to forty degrees. It is obvious that a person standing thirty-three degrees from the line of intended flight might easily be hit by a ball at two hundred yards but might be very unlikely to be hit at ten yards.

The court in their rule number two said:

> "A player assumes the risk or is guilty of contributory negligence and want of due care if he intentionally or carelessly walks ahead or stands within the orbit of the shot of a person playing behind him".[7]

It might seem that the court, in stating this rule, considers assumption of the risk and contributory negligence to be one and the same. Prosser in his text recognizes these as two separate defenses. His rule of assumption of the risk is as follows:

> "When the plaintiff enters voluntarily into a relation or situation involving obvious danger, he may be taken to assume the risk, and to relieve the defendant of responsibility".[8]

There are no facts in the present case which would take the plaintiff out of the principle just stated. He voluntarily entered into the golf match knowing of the danger of being hit by a wild shot. This danger was recognized by the court in their opinion and such knowledge should be imputed to the plaintiff if not actually known. This is especially true since the plaintiff had previously played the game. The litigants had just played eighteen holes together. This should be considered not only to show knowledge of inherent dangers of the game, but also to show that the plaintiff should know of the defendant's negligent propensities. How then is it possible to say that the plaintiff lacked knowledge when he entered into the game? It appears therefore, that the defense of assumption of the risk applies to the plaintiff.

Is it possible that the plaintiff might also be found to have been guilty of contributory negligence? Prosser says, "His failure to exercise ordinary care to discover the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence."[9] According to the facts of this case, "Defendant turned on the tee as if to walk over to his bag and plaintiff and his partner walked off the tee to find defendant's first ball. Neither plaintiff nor his partner paid any further attention to the defendant, but walked toward the boundary line."[10] There could be two possible actions taken by the defendant when he turned "as if

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7 See n. 1, supra.
8 Prosser, Torts, p. 376, (1st ed. 1941).
9 Ibid., p. 386.
10 See n. 1, supra.

to walk over to his bag". One, he could be going to pick up his bag and follow the plaintiff off the tee, or two, he could be going to get a third ball out of his bag to hit under the "Mulligan Rule". Under the facts of this case it appears that two was the actual intent, unless it can be shown that the defendant carried two extra balls in his pocket. If this was his habit, the plaintiff should have gained knowledge of it from the previous eighteen holes. The plaintiff could have discovered his dangerous position, if it was actually dangerous, by merely turning his head to see if the tee was clear. Instead, he paid no further attention to the defendant. Here, as well as with assumption of the risk, there is a question of the standard of conduct of the plaintiff.

This question of standard of conduct is usually said to be a question of fact, and should be a function of the jury in all doubtful cases.[11] It is only where the judgment of reasonable men would not differ that the court will decide that a person has or has not conformed to a particular standard. By refusing to charge the jury on these two defenses, the court was saying, as a matter of law, that the plaintiff was not contributorily negligent and that he did not assume any risk on the golf course. It is submitted that the facts of this case leave enough doubt to make reasonable men differ. It appears, therefore, that the court has encroached upon the function of the jury in this case and prejudiced the defendant.

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TORT — NEGLIGENCE — DUTY TO INVITEES — THROW RUGS

The Supreme Court of New Hampshire, in a recent decision, has embraced a doctrine that is adhered to in some jurisdictions but not in Pennsylvania. This fact situation pertained to unfastened throw rugs on polished floors.

In *Brosor v. Sullivan*,[1] the New Hampshire Supreme Court held that where an invitee falls and is injured on an unfastened rug which lies on a highly polished floor, the question of negligence of a landowner who was aware of the condition was one for the jury. The plaintiff's decedent was eighty-three years old, paid for his room and board and was treated as one of the family. The defendant's wife and the decedent had slipped on the rug previously and had, thereupon, warned the defendant that the rug should be fixed. The rug laid on a highly polished floor in front of the decedent's room, and it was necessary to pass over it in entering or leaving the room.

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11 Prosser, op. cit. supra at p. 282.

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1 109 A.2d 862, (1954).

In the decision, the court was faced with two lines of thought on the subject matter at hand and in opposition to the general rule of no liability said:

> "A holding that the defendant was free from negligence as a matter of law in this case would be tantamount to saying that which is dangerous in fact is not dangerous in law and therefore we do not so hold. The question of the defendant's negligence was properly submitted to the jury."

The court also found that the decedent was not contributorily negligent as a matter of law but that this was a question for the jury as well.

The case law of Pennsylvania is adverse to the decision of the New Hampshire Supreme Court. In *Cutro v. Scranton Medical Arts Bldg.*,[2] the Supreme Court of Pennsylvania held in effect that a landowner was not liable as a matter of law to an invitee who was injured from a fall on a throw rug resting on a polished floor. In this case the defendant, who owned the office building, had leased a suite of offices to five physicians. One of the offices was accessible only through a hallway which was of polished hardwood construction, the polishing having been done by the defendant in accordance with the lease. The throw rugs had been placed in the hallway by the physicians. The wife of the plaintiff in using the hallway to gain entrance to one of the offices, slipped, fell and was injured when she stepped on one of the rugs in the hallway.

The plaintiff on appeal conceded that the maintenance of highly polished floors by an owner of a building does not of itself constitute negligence in regard to a guest or invitee who falls and is injured thereby, as stated in *Gibbons v. Harris Amusement Co.*[3] But the plaintiff charged that negligence in this instance was the creation of a pitfall by concealing the highly polished floor beneath small rugs in such a manner that the user was unaware of the dangerous condition. The court disposed of this contention as follows:

> "The presence of throw rugs on a polished floor is not negligence, Gibbons v. Harris Amusement Co. supra. . . ." and "the practice of placing throw rugs upon polished floors is a general one, and only reasonable care is required of the person stepping upon such rugs to avoid falls. Here the plaintiff had ample opportunity to observe the condition and it is not the fault of the defendant that she did not do so."

In conclusion, Pennsylvania case law holds that as a matter of law the owner of a building is not liable to an invitee or guest who slips on a throw rug which rests on a polished floor.

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2 329 Pa. 382, 198 Atl. 141, (1938).
3 109 Pa. Super. 484, 167 Atl. 250, (1933).