GOLF AND THE LAW : MORE THAN ERRANT GOLF BALLS

Craig Brown *

Introduction

Casual observation suggests that many lawyers play golf. It is not surprising that this should be so considering how the game and the law are uniquely linked. So much about the game has a legal angle it is as if golf and the law were made for each other. On every fairway, in every stretch of rough, in every clubhouse, in every golf bag, at every swing at the ball, in every set of plans for a new course, in every application for club membership, there lurks a potential lawsuit. The evidence is in the law reports, not only of New Zealand, but also of Britain, Australia, Canada and the United States. In 1968 G.M. Kelly wrote in the New Zealand Law Journal:[1]

> Among the armchair strategists of sociology, at least, relative affluence and relatively ample leisure are taken to characterise the modern age. In all advanced countries, wider opportunities for the enjoyment of sport have been welcomed by the citizen. Golf has abundantly shared or suffered the surge of interest. With growth and popularisation, the courts have been increasingly occupied, and sometimes enlivened, by legal hazards attendant on the game.

He was writing on the subject of injuries and damage caused by errant golf balls. He detailed the principles of negligence, nuisance and occupiers' liability at play in those cases and concluded that:

> Numerous legal hazards and uncertainties are thus incident upon the errant golf ball. It is greatly to be hoped that an agony column of case histories will not serve to intimidate the sporting public. For the lawyer, as for others, golf may be a highly prized relaxation; he would not wish to dampen its enjoyment by an over-legalistic approach.

One might think that the prospect (whether feared or welcomed) of increased golf-related litigation would be mitigated by the entry into force of the Accident Compensation Act in 1974. After all, as Kelly's article suggested, the principal cause for the meeting of golf and the law was the meeting of a golf ball and skull or other human bodily part. And the Accident Compensation scheme removed such calamities from the reach of the courts.

But much of the case law has nothing to do with personal injury. As more than one "armchair strategist" of philosophy has observed, golf is a lot like life.

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1 Kelly, "The Errant Golf Ball: A Legal Hazard" [1968] NZLJ 301.

And, as there is a lot more to life than personal injury, so the legal hazards of golf are by no means confined to personal injury.

Thus, while the many lawyers who play golf will likely say they do so for the pleasure of it (and, like Mr. Kelly, even decry the possibility of its "over-legalisation"), that may not be the whole story. Contact karate and playing the Northumbrian pipes are no doubt pleasurable pursuits to those who partake of them; but you don't hear of lawyers clamouring for membership in the societies that cater to those delights in the way they seek membership in golf clubs.

The evidence suggests that the reasons for golf's popularity among lawyers may be professional as much as recreational. And this is not just because it is a good way to entertain clients or to do deals in pleasant surroundings; to "network" in the modern argot. One can entertain clients at a fine restaurant at a fraction of the cost of a golf membership and there are, after all, other social milieu for meeting people (although one has to concede that the prospects in this regard at the local Northumbrian pipe society are somewhat limited). The real attraction for lawyers is the fact that everything golf-related seems to have potential legal consequences. I do not mean to be so crass as to suggest that golf for lawyers is a form of ambulance chasing; that being in the action increases the chances of getting a piece of the action. Rather, it is that, because the links between golf and the law provide lawyers with a singular perspective on the golf links, an extra dimension is added to the already enjoyable mix of intellectual and physical challenges to be found in the game. In short it establishes golf as a particularly attractive form of continuing legal education.

What follows is an account of some of the cases that constitute this evidence. The sample reflects an extensive and extraordinarily diverse body of jurisprudence. Almost an entire law school curriculum could be taught using nothing but golf cases. There are, of course, negligence cases. Although they tend to deal with personal injury, they employ more widely applicable doctrine.[2] There are cases about human rights[3] and other aspects of constitutional law.[4] There are land law cases.[5] There are contract cases,[6] personal property cases,[7]

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2 In the New York case *Povanda* v *Powers* (1934), 272 NYS 619 at 622, the judge wrote:
Golf frequently has been designated a Royal and Ancient game. It was at one time "indulged in by kings and the nobility." Accidents on the golf course in those days were, of necessiity, few in number. With its increasing popularity in the last score of years, golf has now become the game not only of the select and expert, but of "dubs" and duffers as well. In this evolution the source of danger from flying golf balls on a golf course has increased in proportion to the number of players. There now appears a necessity for sending the much legally used ordinary reasonable, careful, and prudent man upon the golf course to determine the mode of conduct for players.
See also *Ellison* v *Rogers* [1968] 1 OR 501 (HC) where it was decreed that it was not reasonably foreseeable for an inveterate slicer to hook his drive even if that did cause injury to someone on the adjacent fairway.

3 See, e.g., the cases discussed below under the heading "Discriminating Taste".

4 See e.g. *Grant* v. *Canada (Minister of Indian Affairs)* (1990), 31 FTR 31 (FCC) about aboriginal land rights.

5 See e.g. *Lake Erie and Northern Ry* v *Brantford Golf and Country Club* (1916), 32 DLR 219 (expropriation), *Guerin* v. *The Queen* (1984), 28 ACWS (2d) 115 (SCC) (leases), *Brentwood Lakes Golf Club* v *Central Saanich* (1991), 6 MPLR (2d) 1 (BCSC) (planning).

trademark cases,[8] tax cases,[9] patent cases,[10] and corporate cases.[11] There are criminal cases from theft[12] to murder.[13] Administrative law and municipal law, involving disputes with bureaucrats or club officials, feature too.[14] Labour law,[15] family law,[16] insurance,[17] defamation,[18] nuisance,[19] conflict of laws,[20] and environmental law;[21] they are all represented as well.

Bending the Rules with "Fancy Inventions"

One category of case has to do with upholding the rules. From time to time someone tries to bend the rules, either the rules of the game itself as promulgated by the Royal and Ancient Golf Club of St. Andrews and the United States Golf Association , or rules about some related matter, such as team selection or conditions for a tournament. We golfers like to think this is rare. In 1932 a New York judge, unable to find any legal precedents for a case involving golf, said it was because:

> This is, indeed, indicative of almost universal compliance with the rules of the game, and evidence of care, courtesy, and sportsmanship on the part of those who play the game, all of which have contributed so largely to its popularity.[22]

As it happens, departures from the rules are perhaps not as rare as we think. The law reports testify to attempts by golfers or administrators to act inconsistently with the rules and the consequent grievances by those affected who have sought satisfaction, beyond the course, beyond the committee room,

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6 See e.g. *Ouellette* v *Amherstville Golf Course* (1982), 16 ACWS (2d) 422 (Ont. Co. Ct.). The plaintiff paid the golf course to allow him access at night to collect worms which he would sell as bait to anglers. He sued for return of his money when he discovered the golf course was fertilised with a spray of effluent from a sewage lagoon making conditions for worm-picking less than attractive, and when he failed to find many worms. His claim was denied when no health hazard was proved. The court said he could have provided in the contract for deficient worms and smelly conditions.

7 See e.g. the cases discussed under the heading "Possession is Nine Points".

8 See e.g. *Wilson Sporting Goods* v *Metro Jeans* (1992) , 42 CPR (3d) 83 (T.MApp.Bd.).

9 See e.g. the cases discussed under the heading "Giving Unto Caesar".

10 See e.g. the cases discussed under the heading "Really Fancy Inventions".

11 See e.g. *Karsten Manuf.* v *USGA* (1990), 728 Fed. Supp. 1429 (US Dist. Ct. Ariz.).

12 See e.g. *Hibbert* v *McKiernan* [1948] 2 KB 142.

13 *Workman* v *The Queen* [1963] SCR 266. Chief among the exhibits were blood-stained golf clubs.

14 See e.g. *Hundal* v *West Vancouver* (1990), 23 ACWS (3d) 370 and the cases discussed below under the heading "Internicine Warfare".

15 See e.g. *Stewart* v *Logan Lake Golf Club* (1988), 10 ACWS (3d) 177 (BCSC).

16 See e.g. *Alexander* v *Alexander* (1981), 14 ACWS (2d) 461 (Ont. Co.Ct.), involving a matrimonial dispute over a golf membership.

17 See e.g. *Walls* v *Constellation Assur. Co.* (1986), 38 ACWS (2d) 231 (Ont. HC).

18 See e.g. *Tolley* v *Fry* [1931] AC 333 (HL).

19 See e.g. *Lester-Travers* v *City of Frankston* [1970] VR 2.

20 See e.g. *Kane* v *Canadian Ladies' Golf Assn.* (1992), 102 Nfld & PEIR 218 (PEITD).

21 See e.g. *Jones* v *Delta* (1992), 69 BCLR (2d) 239 (BCCA).

22 *Simpson* v *Fiero* (1932), 260 NYS 323 at 326, affd 262 NY 461.

in courts of law. And the courts have sometimes felt obliged to respond. In 1911 a dispute about the regulations for play at Prince's Golf Club in England came before the court of King's Bench. Justice Scrutton felt it necessary to say:

> I may say that an objection made in argument to the regulation requiring obedience to the rules and etiquette of golf seems untenable. The person admitted to the golf course must play golf, not some fancy invention of his own which he thinks in an improvement, such as playing two balls as a single player.[23]

Usually, the courts are reluctant to get involved in the internecine squabbles of a voluntary association, such as a golf club or a national golf association. But they are concerned to see that people and organisations honour the contracts they enter into. To join a body such as a golf club, and by extension the wider associations with which the club is affiliated, is to enter into a deal. One pays one's subscription and accepts the rules of the game and the by-laws of the club. On the other side one gets a commitment that the rules announced at the time are the ones that govern. So if a player has been caught by some rule that has suddenly and mysteriously materialized, the courts, which generally take a dim view of that, might just be interested enough to listen.

But there are limits, as a Mr. Johnson from Montana discovered in 1986. He objected to the fact that club officials had reduced his handicap to zero. Some of us might be so proud of a scratch handicap the last thing we would do would be complain, to anybody. But if one is seriously into handicapped competitions, a zero can be, well, a handicap. And so it must have been for Mr Johnson. He felt strongly enough to sue his club to get it increased.[24] The Supreme Court of Montana was not very sympathetic. A golfer has "no right to a specific handicap," it said. Mr. Johnson had not been submitting regular score cards but did put in one – for a 66. The club followed the procedure approved by the United States Golf Association and reduced his handicap from five to zero. By joining the club and the wider brother and sisterhood of organized golf he had, by implication, agreed to this arrangement. So zero his handicap remained. It is not recorded whether any of the judges was a golfer but it is not hard to picture a learned eminence, who struggles on a Saturday to break 90, sitting there listening to the

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[23] *Conservators of Mitcham Common* v *Cox* [1911] 2 KB 854, at 887 (KB). It is not uncommon for judges to show off their knowledge of the game. See e.g. *Michaud* v *Grand Falls Golf Club* (1990), 110 NBR (2d) 47. The court (at p.50) said:

> Every hole on a golf course has an area from which the ball is struck for the first time. This is called the teeing ground. The object of the game is to follow a fairway which connects the teeing ground to a green and to put the ball in a hole in the green in the fewest number of strokes.
> In order to accomplish this one must use the proper equipment and follow the rules of golf published by the Royal Canadian Golf Association. No one for instance could maintain that you could get a hole-in-one by playing the ball from in front of the tee or while riding in a golf cart.

No doubt the court's grasp of fundamentals was a great comfort to the litigants.

[24] *Johnson* v *Green Meadows Country Club* 721 P(2d) 1287 (Mont. 1986).

complaint of a man who can shoot 66. It would have taken effort, one imagines, to retain total impartiality.

There is a better chance of success in cases involving the rules, not of the game itself, but pertaining to the conditions for the awarding of prizes or team selection. Consider *Michaud* v *Grand Falls Golf Club*.[25] Mr. Michaud entered the club's annual Potato Blossom Festival tournament. Among other prizes, there was a car on offer for the "first hole-in-one on number 2" provided the competitor had registered "at the bar". Mr. Michaud duly registered and, as luck would have it, scored an ace on the number 2 hole. But the celebrations had hardly begun when a killjoy official announced that Michaud did not, after all, qualify. The problem was the Grand Falls course had only nine holes. It being an eighteen hole tournament, every competitor had to play each hole twice. And Michaud's feat came on his second time round. According to the official, he was therefore playing his *eleventh* hole.

But the New Brunswick Court of Appeal did not see it quite the same way. The club's clever argument that number 2 is not number 2 was turned against it. The tournament had so many entrants that a shotgun start was required. (This is where everyone starts at about the same time, each group of players beginning from a different hole on the course and proceeding through the holes in rotation ending on the one immediately before the one where it started. One group starts on number one and ends on 18 in the usual fashion, another starts on, say, number 4 and ends on number 3). But at Grand Falls the matter was complicated in that there were only nine holes. Not so complicated for the court though. Michaud happened to start on number 3. So when he played number 2 the first time he was playing it as number 11. That is, his 18-hole rotation was 3,4,5,6,7,8,9,10, 11 etc. Therefore the first time he got to number 2 he was playing it as number 11. The second time he was indeed playing it as number 2. That, you will recall, was when the magic event occurred. The court said this was only applying the usual rules of golf, including those defining a shotgun start. If the club wanted to depart from the usual rules (to incorporate fancy inventions, as Justice Scrutton might have said), they had to give clear notice of that to the competitors. Otherwise the normal rules apply and under normal rules, a hole-in-one on number 2 is indeed a hole-in-one on number 2.[26]

Consider, too, *Kane* v *The Canadian Ladies Golf Association*.[27] In September, 1992 the World team championships of women's amateur golf were held in Vancouver, British Columbia. Shortly before that time a Canadian team was selected by officials of the CLGA. Lorie Kane was named as non-playing alternate. This was a considerable blow to Ms Kane who, according to the report of the legal proceedings that followed, regarded her exclusion as "detrimental to her future livelihood" because she had "dedicated her life to golf and hoped to become a professional". She went to court seeking an order that she be included as a playing member of the team and that the CLGA not send the team as selected. Proceedings

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25 (1990), 110 NBR (2d) 47.

26 M. Michaud may not have been so keen to claim his prize if it had been like the one offered for a hole-in-one at the 1985 New South Wales PGA tournament. It was put up by a funeral parlour and was a free funeral and tombstone.

27 (1992), 102 Nfld & PEIR 218 (PEITD).

were initiated in Charlottetown, Prince Edward island, Lorie Kane's home province.

The tournament was to start on September 24. Legal proceedings started just over a week before. The judge's first important ruling was made on September 14.[28] It dealt with the conflict-of-laws issue. The judge held that there was no problem having the case heard in Prince Edward Island. That the selection had been carried out in New Brunswick, that the tournament was to be played in British Columbia, and that the Association's headquarters and most of the relevant documentary evidence were situated in Ontario, did not detract from the suitability of Prince Edward Island as the choice of jurisdiction. In fact, the dispersal of relevant factors only demonstrated that no one place had a superior claim to jurisdiction. Where the applicant lived was as good as any.

With the preliminaries resolved in Ms Kane's favour, the merits of the claim itself were argued and a decision was given on September 18. This was a Friday. The tournament was due to start the following Thursday with opening ceremonies the day before. The judge declared the selection as made to be null and void and ordered the CLGA to make another selection, this time in accordance with its rules.

Now, before we start jumping to conclusions about poor sports and home town judges, consider the argument put forward. Prior to 1992, national teams were selected by the CLGA solely on the basis of an objective formula. Differential scores, that is the difference between players' scores and the relevant course rating ("standard scratch" in Britain), achieved at designated tournaments were averaged. Players were ranked according to their averages with the lowest ranked first. To select a team of three, the CLGA would simply take the three top-ranked players.

In 1992 the CLGA's Director of Teams issued a memorandum stating that henceforth team selection would include a subjective element. Special weight would be given to "exceptional performances" so that the occasional disastrous round would not necessarily ruin the chances of an otherwise talented player. What constituted "exceptional" in terms of score or the tournament or conditions under which it was achieved was not specified. By application of the old system Lorie Kane made the team. It was held that the new selection criteria had been put in place improperly. The director of teams had no authority from the executive of the CLGA to change the method of selection and that, despite assertions to the contrary during the trial, the executive had not approved it prior to the naming of the team. Accordingly the Association had "breached its duty to act fairly by not abiding by its own rules for team selection."[29]

Another player who resorted to legal proceedings to protest treatment at the hands of a ruling body was Jane Blalock.[30] The gist of her complaint was that those who sat in judgment of her conduct had a conflict of interest. In 1972, at the Bluegrass Invitational, an LPGA tournament in Louisville, Kentucky, Ms Blalock, a touring professional, was seen illegally improving her lie a few times.

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28 35 ACWS (3d) 1115.

29 Lorie Kane has since realised her dream and is playing successfully on the LPGA Tour.

30 *Blalock* v *LPGA* (1973), 359 F. Supp. 1260.

She had been under suspicion since an earlier tournament when a member of the LPGA Executive and fellow player thought she saw Blalock replacing her ball on the green a little closer to the hole than where her marker lay. A team of observers was assigned to watch her at the Bluegrass. Some lurked in the trees. Others watched through binoculars from the television tower. These observers reported that five times Blalock replaced her ball on greens illegally to avoid spike marks and other impediments, and that once she had moved the ball on the 16th fairway. Soon after the tournament, the Executive of the LPGA met to deal with the matter. It disqualified Blalock from that tournament, placed her on probation for the rest of the season and fined her $500.

Some of the other players thought she had got off too lightly and 27 of them petitioned the Executive to impose a more severe penalty. Three of the five-member Executive Board met again. It was claimed by someone present that Blalock had admitted the transgression, a claim she, Blalock, later denied. With the agreement, obtained by phone, of one of the absent members, the decision was taken to suspend Blalock for a year. She was told about it two days later.

Blalock took exception to this harsher treatment. Her father hinted to the press she was being singled out as an example to others because she was a high profile player. In part that had to do with the fact that she was leading money winner for the year. It was also suggested that it had something to do with the sexy outfits she favoured. In any event, she brought legal proceedings in the US District Court in Atlanta. Her lawyers argued that the suspension was illegal under US laws designed to uphold freedom of competition in commerce.

First she won a temporary restraining order, allowing her to play the following weekend – she had already missed one tournament. Nine days later, after a hearing on the question of an injunction, the judge said she could keep playing until the legality of her suspension had been resolved. However her winnings through the scheduled end of the suspension were to be paid into court. If she ultimately won the case, she would get the money back. If she lost, the money would go to the LPGA for redistribution to those players who would have won it had Blalock not been playing.

The next stage, about a year later, was the trial on the illegality of the suspension. The court held that the LPGA's action was not a reasonable exercise of self-regulation. The problem for the LPGA was that the Executive, which had taken the decision to suspend Blalock, was made up of other tournament players. They had exercised "unfettered, subjective discretion" to the prejudice of a fellow competitor. They stood to gain financially by Blalock's exclusion from the "market" of professional tournament golf.[31]

None of this, particularly the outcome of the litigation pleased many of the other players. One was quoted as saying, "I think it's perfectly terrible. I think

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[31] An appeal against this decision failed. So Jane Blalock got to keep her winnings for the period of the litigation ($43,000) and also got damages. The case had not seemed to affect her play. She finished 1972 second on the money list having won, among other things, the Dinah Shore Tournament, a major. Nor was she adversely affected subsequently. From 1971 to 1980 she was never out of the top ten on the money list. She won 29 tournaments.

the judge is obviously not a golfer."[32] One wonders if Justice Scrutton would have agreed.

Really Fancy Inventions

The aspect of golf's popularity that is perhaps most beneficial for lawyers is the boom in the golf equipment business that comes with the boom in golf itself, hand in glove, so to speak. The growth of any industry carries along with it increased legal business. A story that gives the point dramatic focus is the story of Ping Eye2 golf clubs made by the Karsten Manufacturing Company in Arizona. The clubs first came out in 1984. In 1987 Mark Calcavecchia used the clubs and during the Honda Classic that year, a tournament watched by millions on television, he showed why club makers sponsor players. Calcavecchia played a shot to a green from the rough and got the ball to stop immediately. It was so impressive that the commentators remarked on it with particular reference to the make of club. From then on sales of Ping irons soared.

The distinguishing feature of these clubs was the shape and configuration of the grooves in their faces. In 1942 the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews established a rule that the grooves on iron clubs should be "V" shaped in cross-section and that the space between them be at least three times the width of the groove. In 1984, the USGA promulgated a new rule allowing "U" shaped grooves (incorrectly called "square" grooves). The Ping clubs utilised "U" grooves which were closer together than three times their width. As Calcavecchia demonstrated, this allows a good golfer to achieve more spin.

As millions discovered, this does not help players who are merely average or worse; those of us who do not put spin on the ball anyway. But the governing bodies worried that the new clubs gave too much advantage to the ordinary professional in relation to the very best players. In other words, the Ping Eye2 neutralised the special talents of the most skilled. So in 1987 the USGA announced a rule, subsequently embraced by the R. and A., that would take effect for all championships conducted by them after 1 January, 1990 and all events played under the rules of golf beginning 1 January, 1996. This rule directed the use of the "30 degree method" which meant, basically, that the space between grooves had to be three times their width.

By now Ping Eye2 clubs, which did not satisfy the new rule, accounted for 99% of Karsten's sales. The rule meant big trouble for them, not the least of which was the problem of all those people who had bought the not inexpensive Pings. Saddled, they would be, with top-of-the-line illegal clubs.

Enter the lawyers. In August, 1989, Karsten filed suit in a US District Court in Arizona against the USGA and the R. and A.[33] arguing that the rule imposed improper restraints forbidden by America's anti-monopoly (antitrust) laws. They sought $100 million in damages and an injunction ordering the golf bodies to change the rule.

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32 New York Times, June 29, 1973.

33 *Karsten Manuf. Co.* v *USGA* (1990), 728 F.Supp. 1429.

The first problem faced by Karsten's lawyers was that the R. and A. turned out not to be incorporated. It is simply a collection of individuals. Under Arizona law you cannot sue an unincorporated body, you have to sue the individuals who run it. So they had to change their pleadings to name some of the people at the R. and A. personally. They need not have bothered. The judge threw out the case against the R. and A. people because they did not "purposefully avail themselves of the privilege of conducting their activities" in Arizona and, anyway, it was not a convenient or appropriate place to be suing them bearing in mind the ability of the Arizona court to enforce any judgment it might issue against them. So the R.and A. was off the hook and, to this day, one may not play in an event run under their aegis with clubs whose grooves are not sufficiently far apart.

But the USGA, being both incorporated and holding itself out as the ruling body for golf in Arizona and elsewhere, had no such easy answer to the suit. But after more than two years of fact-finding procedures involving highly technical information (and who knows how many millions in legal bills) they agreed at last to a settlement. The USGA accepted as legal clubs already made and Karsten agreed to comply with the new groove-spacing rule from then on.

A reasonably satisfactory outcome from Karsten's point of view, one would think. Even the R. and A. does not object to their new clubs and they protected all those people who had bought the old clubs for use in the US, their most important market by far. But still we are not at the end of the story. The Professional Golfers Association of America had also imposed the spacing rule, but had gone further, insisting on the 1942 standard of "V' grooves only. Even the new Pings would not satisfy that. The ban had been instituted by the PGA's board of directors. The board had ten members, but only three could vote on the question because the other seven were numbered among the 150 or so tournament professionals sponsored by, yes you guessed it, Karsten Manufacturing.

So Karsten's lawyers could keep the meter running. The case against the PGA was described in Golf Digest as "the most lengthy and acrimonious lawsuit in the history of professional golf." While matters dragged on the offending clubs were still in use on the tour because Karsten had won an interim injunction until the final resolution. Finally, though, after another year, and a reported $9 million in legal costs, the PGA also settled. It agreed to withdraw its insistence on "V" grooves only and to recognize for most things, including groove specifications, the rules of the USGA.

The phenomena of technological development in golf attended by legal controversy is not new. Golf has been growing ever since it began and regular improvements in equipment have followed. To this history of golf there is a companion legal history. Take the golf ball, for instance. For the first 400 years or so of the game, the ball was a "featherie" made of a leather casing stuffed with feathers. In the 1840s this was replaced by the "guttie." This was made by heating and moulding a substance called gutta percha, a rubber-like gum substance that came from India. Then something called the "Haskell" ball appeared and took over so completely that guttie makers were driven, it was said, to melting their stock.

Coburn Haskell devised the ball that bore his name in Ohio in the latter part of the 1890s. The story is that he was visiting his friend, Bertram Work, at the B.F. Goodrich factory in Akron which made guttie balls and at which Work was the supervisor. According to historian Gerald Astor,[34] he spied a pile of rubber strips and inspiration struck. The idea was to a wind rubber thread tightly around a solid rubber core and cover the whole thing in a gutta percha shell. The boffins at Goodrich put together a machine for winding the rubber about the centre. The result was a ball that achieved greater length although it tended to be more wayward. Haskell and Work had no doubts about the advance their ball represented. In their patent application they claimed:

> [O]ur golf ball has exceptionally high "driving" qualities owing to the fact that the impact of a golf club is capable of distorting it, and little tendency to bound, by reason of the fact that little, if any, distortion takes place upon contact with the ground. The very great resistance to change in form which the core possesses is due to the fact that the thread is at all parts of the ball under a tension close to the elastic limit tending to maintain a perfect sphere,and, hence, the slightest distortion is resisted by approximately the full strength of the material.
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> The covering of gutta percha acts not only as a protection to the softer and more highly elastic material beneath it, but also as a muffle to the latter preventing excessive springiness under slight impact and yet permitting the concussion of the golf ball to act sufficiently on the elastic core.

Thus the ball travelled further when driven and ran truer when putted.

Haskell and Work patented the ball in England as well as the US in 1898. Within a very short time, many imitations were on the market. Among these were the "Springvale Eagle", the "Springvale Hawk," and the "Springvale Kite," made and sold by Messrs Hutchison and Main. They were made more or less to the specifications described in the patent. If the patent was valid, it was a clear infringement.

Legal proceedings were commenced to enforce the patent. The main defence was that the patent was invalid; it should not have been granted because the Haskell ball was nothing new. Evidence was adduced to show that George Fernie of Dumfries had, in 1893, "made and sold ... golf balls with a kernel of cork, covered with strips of rubber wound under tension and tied with thread, the whole thing being covered with gutta percha." There was also evidence that in the 1870s Captain Duncan Stewart of Argyleshire had made balls of "wound rubber thread with a cover of gutta percha, and had disclosed, to a limited extent, the method of construction." The trial court held that Fernie's ball had not become prominent because of imperfections in manufacture but that his product and that of Stewart had "proceeded beyond experimental user." This meant that Haskell's idea was not novel at the time the patent was issued. It was therefore not an enforceable patent.

The Court of Appeal agreed. When the case reached it in 1908, so did the House of Lords.[35] Lord Loreburn summed up the views of his brethren:

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[34] G. Astor, *The PGA World Golf Hall of Fame Book* (Prentice Hall, New York, 1991) p.36.

[35] *Haskell Golf Ball Co.* v *Hutchison (No.2)* (1908), 25 RPC 194 (HL).

> [T]he case itself is really one of the greatest simplicity. The alleged invention was for a golf ball comprising, in effect, two parts; one was the cover and the other was the interior. The cover was old and the interior was old, and I think the combination and the use of the two together had also been distinctly anticipated...[T]he patent cannot be sustained.

A neat way, perhaps, for the British to exact, if not revenge, at least the last word on the matter of the Haskell ball. Despite the newly discovered Scottish genesis of the wound-rubber ball, it had been sniffed at as the "American" ball and denigrated for its unpredictable flight. When it was first introduced in Britain some called them "bounding Billies" in reference to the difficulty had in controlling them. Those who preferred them were called "bounders". The surviving pejorative implication of that term says everything about the British attitude. Yet the marketplace soon told a different story and the guttie was consigned to the museum at St. Andrews. It is another episode in the one-upmanship that has long characterized golf relationships across the Atlantic. In the end, in the House of Lords no less, the British neatly turned the tables. They were able both to claim credit for the ball's invention and to throw the market open to all, especially British, manufacturers.

Clubs and balls have not had all the limelight in the legal annals of golf equipment. The humble tee had its moment too. *Nieblo Manufacturing Co.* v *Reid*[36] is a 1928 case that went all the way to the Supreme Court of Canada. Nieblo had been granted a patent in 1924 on two versions of a golf tee. The patent described the first of these as "a shank with a pointed end carrying a concave, ball-supporting member." The other was "a cone-shaped shank with a disk on top." Reid had produced something similar and Nieblo sued alleging patent infringement. Again it was a question of the patent's validity: did it relate to a new invention? The Exchequer Court heard about American patents dating back to 1893 for devices that replaced the original method of building a small mound with a handful of sand or dirt. There was, for example, Grant's patent of 1899 for "a wooden shank tapered to a point with a rubber tubing on top in the shape of a cup." The judge noted that there were then, in 1928, some 50 to 60 kinds of artificial tees available, including some made of rubber, some with weights attached, some with a cord, and one in the form of a rubber pyramid that sat on top of the ground. There was also evidence of a game played in the 1880s called "lawn pool" which required the removal of a ball from atop a peg by hitting the peg. This peg was the dinosaur to the golf tee's lizard, it seems. In the result, the judge came to the view, one not disturbed by the Supreme Court, that Nieblo's "improvement" in the tee, a slight alteration in size, did not amount to ingenuity or invention such as would justify a patent. He said: "The plaintiff came late in this narrow field of golf tees; he came when common knowledge of the art was extensively spread." So it is not just a matter of inventing a better mouse trap after all.

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[36] [1928] SCR 579.

Possession is Nine Points

Cases involving golf equipment sometimes raise issues even more fundamental to property law than patents; those concepts beloved of property law professors, possession and title. A good example involved the once-amorous Mr. Mott who, in the throes of what must have been a pretty serious infatuation, gave his girl a ring *and* a set of golf clubs. Alas, things cannot have lasted. One senses that from the fact that he sued her to get them back. The Ontario court said a gift was a gift, and she did not have to return them.[37]

That is not the only case showing how much value people place on their golf equipment and the lengths they are prepared to go to protect or retrieve it. Take the story of poor Harold Hibbert. One day, near the end of 1947, he was arrested by the local constable on the Reddish Vale golf links in the borough of Stockport in England. Despite his initial denial of the fact, he was found in possession of eight golf balls worth a total of ten shillings. One ball bore the distinctive marking of a member of the club. Harold was charged with theft contrary to section 2 of the Larceny Act 1916. When he came up before the Justices he was convicted and fined one pound. At the request of the members, the constable had been "keeping watch" to prevent the taking of golf balls. It must have been a quiet place in those days, Stockport.

It would seem like a case of little consequence. Harold only got a fine of one pound, after all. He did not face the hangman's noose like another golf ball thief in 1637.[38] You would expect no record to have survived. Not enough was at stake for someone like Harold to take the trouble of an appeal, even if he could afford it. But it is the kind of case which tickles the fancy of those lawyers with an academic (and/or charitable), as opposed to a financial, frame of reference. There were no big fees on offer but the intellectual challenge, to some, was irresistible. So the no doubt bemused Harold agreed to an appeal. His counsel were the Cambridge don Garth Moore, and a barrister, Geoffrey Lane, who was later to become a Lord Justice of Appeal.

The justices had seen in this case intricate questions pertaining to the legal theory of possession. They had said that for a charge of theft to stick, two things had to be shown. The first was that the property taken had to have had an "owner" at the time in the sense that someone was in possession of them. The second was that the person charged had to have intended to deprive the owner of the property permanently. They said the individual golfers who had lost the balls were no longer the owners because they had abandoned them. But the club had become the owner because of the measures taken, including deployment of agents of law enforcement, to assert that ownership.

On appeal to the Court of King's Bench,[39] learned counsel argued that the club had not done enough to establish possessory rights that would count as ownership for these purposes. There was not enough control over the balls at the time they were taken. But the court would have none of it. Such academic questions did not arise, it said. The members of the club jointly owned the land. This conferred on them special rights over property found on the land which

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37 *Mott* v *Morrison* (1993), 40 ACWS (3d) 362 (Ont. GD).

38 G. Astor, above, note 34, p.4

39 *Hibbert* v *McKiernan* [1948] 2 KB 142.

prevailed over the rights of trespassers and if a trespasser tried to deprive them of those rights, that was theft. Chief Justice Goddard put it this way:

> The fact is that the theft alleged was of golf balls from a golf course; on every course balls must be lost from time to time, to be retrieved when the grass is cut or when someone has the time to look for them. Clearly there is no licence from the club for all and sundry to go on to the course and take what they can find, and the facts show that the club did mean to exclude these pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property.

Justice Humphrey said a member who lost a ball might not have a claim to it superior to an "honest finder" but that young Harold did not fall into that category. In fact he was not a finder at all. He was:

> a trespasser who had been warned off the golf course and ... he was aware that police were employed for the purpose of preventing unauthorised persons from picking up and taking away golf balls .... To describe such a person as having acquired any sort of property in the balls would be fantastic.

Harold's fine was confirmed. The citizens of Stockport could sleep more peacefully in their beds at night.

But rest assured. It is a rare case in which a former owner, or a golf club, can show that he/she/it intended to retain a claim to a "lost" golf ball, even against a tresspasser. A few years ago in British Columbia, a man was caught standing in an artificial lake at the Mayfair Lakes golf course. He was dressed in a wet suit and holding a bucket of golf balls. A companion was submerged picking up more. The enterprising frogmen were charged with theft. The club was a bit put out it seems because it had made a deal with another diving outfit. Our chaps were prosecuted on the strength of the *Hibbert* precedent. The manager asserted that lost balls became the property of the course. Removal without the course's permission was therefore theft. No, said Judge Davis of the Provincial Court[40]. There were no posted notices or other warnings against recovering lost balls. Nothing, in other words, to show a claim to ownership. The lads might have been guilty of trespass, but they had not been charged with that. They were innocent of theft.

Giving Unto Caesar

Some places are awesome. I do not use the word as my children might, to describe theme parks or video arcades. I use it here in its literal sense, to refer, for instance, to great cathedrals. Whether you are religious or not, when you enter St. Peter's in Rome or Westminster Abbey you sense at once that a respectful silence must be observed. If you must speak you do so in hushed tones. You feel the urge, between admiring glances at the ceiling, to bow your head slightly. You remove your hat. It is the same if you are in a famous opera house or theatre

[40] *The Queen* v *K.A.* (1993), BCJ No.2314.

when no performance is in progress. Perhaps it is the arias or the soliloquies being played out in your imagination, or is it the ghosts of great stars and grand occasions? Whatever, you are in awe.

It is no exaggeration to say that a similar experience befalls the golfer when treading, for the first time, the sacred turf of one of the shrines of golf; like St. Andrews. You cannot help it when you first stand before the stone clubhouse and gaze across the first and eighteenth fairways. You see the winning putts of the great champions and hear the cheers of the crowd as the claret jug, the Open Championship trophy, is raised in triumph. The same is true at Muirfield, at Augusta and Pebble Beach. To be there is to be present among a deity of sorts, the ghosts of championships past. These are places above normal mortal experience, above the mundane.

What an indignity then when such a place is touched by the grubbier realities of life, like taxation and local body rates. Prestwick in Scotland was the site of the first two dozen British Opens. It is where Old Tom Morris and Young Tom Morris performed legendary feats. But that cut no ice with the local council. It decreed that rating for the water supplied to the ladies' clubhouse was to change. In place of a cheap flat rate, charges were to be based on actual usage determined by a meter.

The legislation governing the matter provided that the cheaper arrangement be made available to "houses" which were further defined as "dwelling houses". As much as golfers like to spend a lot of time at the golf club and as much as they might regard the clubhouse as their second home, it is difficult, seriously, to call it a "dwelling house". But, as it happened, the club's chairman was a lawyer and such logic is no obstacle to lawyers. He argued that the water used in the clubhouse was used for the same purposes for which it was used in dwelling houses, washing dishes and personal hygiene. It followed, surely, that it should be charged for at the dwelling house rate. The Sheriff's Court at Ayr agreed but the burgh had the temerity to appeal and Scottish Court of Session overturned the decision.[41]

Carnoustie is another of the hallowed places of golf. It has been the site of numerous Open Championships and is considered to be one of the great golf courses in the world. But, for all that, it is not immune from the reach of the taxman. During World War I and the years immediately after golf had felt the pinch and the committee charged with running Carnoustie had run up a big debt. As a judge put it, "they fell behind in the world." But by the 1920s the debt had been paid off. And, moreover, revenue from visitor's fees exceeded the expenses of management. Unfortunately for the committee, this was a fact of interest to the Inland Revenue Commissioners. The Committee was presented with a tax bill of 789 pounds.

The committee challenged this assessment and the matter found its way to the Court of Exchequer of Scotland. The court[42] said the law was clear. The committee was operating as a "trade or business" and profits were taxable even if the level of income was controlled and profits limited. What was worse, the statute made no provision for claiming debt repayments as a business expense.

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41 *Prestwick St.Nicholas Golf Club Trustees* v *Prestwick Corporation* [1909] Sess. Cas. 94.

42 *Carnoustie Golf Course Committee* v *Inland Revenue Commissioners* [1929] SC 419.

The committee's lawyers were also confronted with an adverse precedent. In the early 1900s the Carlisle and Silloth Golf club had opened its facilities to the public. The takings from green fees generated an excess of revenue over expenses, taxable income in other words. Taxes were demanded to the tune of 66 pounds. The members thought of it merely as a way to keep down the cost of maintaining the course. As their lawyer argued, the club was just "an association of gentlemen who, by receiving fees from visitors, reduced the expense to themselves of playing golf." Maybe, said the Revenue, but it is still a business of supplying to the public, for a price, a recreation. The English Court of Appeal agreed; taking green fees is just like taking gate money from strangers for an entertainment.[43]

Counsel for the Committee in the Carnoustie case tried to argue that his case was different. He said the Carnoustie operation was a public one. There was no private lease and the green fees were not a means of reducing membership dues. They went simply to cover necessary expenses. The court found unanimously, if regretfully, against the club.[44]

Of course governments do not just get their money from taxes on income and land. There are sales and value-added taxes and customs tarrifs from which few aspects of golf are immune. And if you think regular tax officials are bureaucratic you should read a tariff case or two. *Par T Golf (Alberta) Ltd* v *Deputy Minister of National Revenue (Customs and Excise)*,[45] a 1987 decision of the Tariff Board of Canada, will give you the flavour. The company imported a unit for:

> [A]nalyzing the flight of a golf ball from a driving platform to hitting a high-impact screen. Information from miniature cameras is fed into a computer to calculate the vertical and horizontal direction of the ball. An image appears on the screen following the course a real ball would take on an outdoor fairway.

Not surprisingly the people at customs did not have this listed in their schedule of tariffs. They did have a category described as "goods constituting electronic data processing in nature" so they levied according to that. This general category bore a higher tariff than those enumerated more specifically. Par T said its machine qualified as an "electronic data processing machine or apparatus", a listed category. The Deputy Minister disagreed. As in any religion, people involved in golf sometimes just have to live with directives from on high. Par T had to.

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43 *Carlisle & Silloth Golf Club* v *Smith* [1913] 3 KB 75.

44 The only hope is an enlightened legislature. *Terranora Country Club* v *Federal Commissioner of Taxation*, (1993), 93 ATC 4078; 25 ATR 294, involved Australian legislation allowing an exemption from tax for clubs "established for the encouragement or promotion of an athletic game or sport." The Terranora Country Club in New South Wales provided facilities for golf as well as target shooting, tennis, deep sea fishing, horseback riding, softball and touch-football. There was also considerable "social" activity in the form of eating and drinking, concerts and, particularly, poker machine gambling. 93% of the club's income was derived from social and gambling activities. The tax people argued the exemption did not apply. The judge said it did. The social side was a means of financing the sporting side which was the club's main focus.

45 (1987), 14 CER 261, 12 TBR 300.

Discriminating Taste

In many parts of the world golf is an exclusive sport. Club memberships are scarce, expensive, or both. Even where golf is generally widely accessible there is a class system, some clubs being more exclusive than others. But the thing about exclusiveness is, it tends to exclude people. Once in a while someone resents this. Who gets in, and on what criteria, are not infrequently grist for the legal mill.

One example is *Conservators of Mitcham Common* v *Cox*.[46] In Mitcham, in Surrey, there was situated a common administered, for the benefit of the public, by a statutory body of "Conservators". Among their powers was the authority to set aside portions of the common for organised games. In 1900 they concluded an agreement with The Prince's Golf Club and the Prince's Ladies' Golf Club giving each club a licence to operate a golf course. This agreement included certain regulations governing the use of the courses. Among other things, these regulations prohibited Sunday play, required that all players be accompanied by caddies licensed by the club, provided that only members could use the course on Saturdays, and restricted play on other days to members or any other person who was a resident of Mitcham and who had obtained a permit four days in advance. The regulations had the force of municipal by-laws in that infringement was on pain of punishment by the local Justices of the Peace.

The case arose in 1911 when two of the local citizenry, Mr. Cox and Mr. Cole, flaunted the regulations by playing without caddies and, being non-members, without permits. Mr. Cox had the further effrontery to play on Saturday. They were hauled before the Justices but were acquitted on the grounds that the rules were of unequal application and "an unreasonable interference with the liberty of those subject to the by-laws." The prosecution appealed on the ground that:

> It is plain that all the world cannot play golf on the common. Some restriction must be imposed. Restriction by means of permit is a well-known method recognised by law.

Well, you have to admit, it would be a worry. If you did nothing they would be pouring off the ferry at Dover and rushing, golf bags slung over shoulders, directly to the Prince's Club. The defendants' lawyers did not need to resort to sarcasm. They simply pointed out that a commons is for the public and that barring working people from the course on Saturdays effectively bars them altogether.

The judges agreed. They conceded that some inequality in favour of members was justified because it was the members who maintained the course and without them there would be no course. And residents should have some privileges because it was their common. But any restrictions should be limited and not interfere unduly with public access. Permits, they said, were not necessary. The restrictions on access contained in the regulations were too severe and therefore invalid. However, the requirement of a caddie was quite reasonable and the court directed that convictions be entered for breach of that regulation.

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[46] [1911] 2 KB 854.

With their playing privileges struck down, the members had to rethink their position. In conjunction with the Conservators they drafted new regulations giving themselves exclusive playing rights on Wednesdays and Saturdays from 9.30 to 11 a.m. and from 12.30 to 2.30 p.m. It took only a few years until this was challenged too. A non-member came to play on a Saturday. It was before 11 a.m. when, no doubt mindful of the fate of messrs Cox and Cole, he asked the caddie-master to assign him a caddie. The caddie-master declined saying that, owing to the club's regulations, he could not do so until 11 a.m.

Not content with a mere complaint to the committee, the frustrated player invoked the law; that is, another by-law which stated that, under pain of a fine, no person shall obstruct or interfere with the playing of golf on the common. Yes, he prosecuted the hapless caddie-master for obstructing his game by not providing a caddie before 11 a.m. Believe it or not, the Justices entered a conviction. But the Court of King's Bench[47] would have none of it and overturned the conviction. The poor chap was just obeying orders, they said, and, in any case, the new playing restrictions were no longer too restrictive.

The problem for the Prince's Club was that its course lay on public land. But even where a club owns its land its ability to conduct itself totally as a private club, in that it has absolute power to exclude, may be limited. Exclusion on racial grounds has been notorious among golf clubs in North America. Usually civil rights statutes do not apply to purely private organisations but the courts have paid close attention to the notion of "private" and applied a narrow definition.

Gillespie v *Lake Shore Golf Club* is a 1950 case decided by the Court of Appeals of Ohio.[48] A public golf course was leased to a private individual. In 1946 Mr. Gillespie, a black man, was refused admission to the course but, under threat of a lawsuit, the operator agreed to let him play. Even though privately operated, the course was still open to the public and was therefore subject to anti-discrimination legislation. In 1948 Mr. Gillespie was again refused the right to play. He was told that the club was now private. The club had ostensibly changed hands although the same operator retained control. When Mr. Gillespie applied for membership, he was turned down. But it was all subterfuge. "Members" acquired that status merely by receiving a card when they paid green fees. Some were not even given that. There was no subscription. The court saw through the ruse. It was still a public course and Mr. Gillespie was allowed to play.

Often the arrangement is not quite so transparent. The Kenwood Golf and Country Club in Maryland could never have been called a public course in the way Lake Shore was. Members of Kenwood have included some of the most influential people in Washington D.C. Unknown even to many of the members, the club operated an unwritten policy excluding blacks even as guests. It came to light when a woman member sought to arrange a college reunion at the club. She proposed to invite Walter Washington, then mayor of Washington D.C. and a black man, to be guest speaker. She was told this was impossible. This incident sparked a movement for reform. But the club stood firm. The president said most of the members liked things as they were but refused to take a poll or give

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47 *Harris* v *Harrison* (1914), 111 LT 534.

48 (1950), 91 NE 2d 290.

the reformers a membership list so they could conduct their own. Even so, through personal contacts, they were able to obtain several hundred signatures on a petition calling for change. Still the club refused to budge. A number of prominent people, including US Secretary of State William Rogers and Secretary of Defence Melvin Laird, resigned from the club over the issue.

Finally the group, which included US Senator Frank Church, commenced legal proceedings. In 1970 the US District Court in Maryland[49] held that exclusion of blacks was prohibited by the Civil Rights Act. The exclusion from that Act of "private clubs" did not apply because the club was owned by a profit-making corporation.[50]

A form of discrimination that continues to cause particular irritation is the one based on gender. Exclusion of and restrictions on women have long been a part of private golf clubs. The Prince's Club, which featured in the *Mitcham Common* cases, had one solution. It had two courses, one for men, the other for women. In the early days the Royal and Ancient at St. Andrews confined women to their own course, a large putting green thought appropriate since women were not physically suited to the rigours of the full game. But not all clubs have the resources to provide separate playing facilities. So, given the "obvious" need to separate the sexes on the course at least some of the time, separate playing times have to be scheduled. It is just unfortunate, is it not, that some times happen to be more attractive, more convenient, than others. Someone has to have those times. Whose claim is the more pressing?

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[49] *Bell* v *Kenwood Golf and Country Club* (1970), 312 F. Supp. 753.

[50] With all the bother it takes to get into a club you would not expect it to be hard to get out. The Annandale Golf Club in California had a by-law which stated that a member could not resign unless the resignation was accepted by the board of directors. A member had to find his own replacement before he left so the club would suffer no drop in income. It seems odd to think of that these days when clubs typically have waiting lists but the case arose during the depression. Suitable members were scarcer then. But, understandable or not, the restriction was found by the California Supreme Court, in *Haynes* v *Annandale Golf Club* (1935), 47 P (2d) 470, to be unreasonable and arbitrary. As for the court's reasoning, it is difficult to improve upon the words of Justice Preston:

> This is an action by a golfer against his club for declaratory relief. He wishes to resign as a member of the club and be allowed to go in peace... Doubtless this is the only case in history where a golf club has failed to heed the plaintiff cry of one of its flock. And the court below indorsed its action by refusing to say that plaintiff was entitled to any balm at all. The judgment of the court was that he was "stymied" and must so remain forever and aye unless perchance the board of directors might experience a change of heart and vote him a furlough.... Plaintiff fails to appreciate the implied compliment to him in defendant's desire to retain him as a member. But the record pointedly suggests that plaintiff in the "twilight dim" is bridging this chasm "dark and grim" for some "forlorn" or "shipwrecked" brother, who may follow after him. Defendant insists that unless and until it changes its mind and consents to plaintiff's releases and follows it by a suitable entry in its book of life, plaintiff must gracefully submit and continue to "roll in the fiery gulf."

The Supreme Court said he didn't have to wait for the club. It released him from this golfing limbo.

In most clubs, the powers that be have no doubt. *O'Neill* v. *Pupuke Golf Club*[51] is a case which raised the issue. The committee had passed a by-law decreeing that no woman could play on a Saturday before 3 p.m. and any woman playing after that had to give way to any men who happened along. Some women took exception to this and played in defiance of the rule. They were fined and suspended by the committee. The women challenged this action in court. In explaining the reason for the rule, the club's lawyer said:

> It was perfectly clear that some restrictions on Saturday play were needed....[The by-law was made to] preserve the conditions of the greens and to allow men who are members of the club to conduct their competitions without congestion and interference.

But the restriction was contrary to the club's own rules. The committee had authority to make by-laws "for the regulation of the clubhouse, grounds and links and for the arrangement and control of....matches". It passed the restriction without going, as requested, to a full general meeting. Therefore the question for the court was whether the committee was acting within its powers. The judge thought not:

> I think it is plain that the rule cannot have been devised for the protection of the grounds in the interests of all players for...men and boys may, if they like, use the links on Saturday mornings. The Committee must have had some other object in view, and that object appears to have been to give men players special facilities on Saturdays.
>
> It may be that men players, debarred by circumstances from using the course during the week, are entitled to some special consideration, but can they get that by means of a by-law which curtails the rights of other members of the club?

He added that the rule could hardly be said to be in the furtherance of the declared object of the existence of the club: "to encourage the growth and spread of the game of golf." It is not recorded if the composer of that platitude regretted his flash of eloquence.

In a 1927 English case, *Cole* v *Merton Park Golf Club*,[52] in which women members were seeking a bigger role in the governance of a club, the club's lawyer, no doubt without so much as a blush, argued:

> This is an important case for all golf clubs, as the administration of this golf club is similar to the administration of many golf clubs all over the country. If His Lordship should hold that these ladies had a right to attend the general meetings it would upset the domestic arrangements of many other clubs.

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51 [1932] NZLR 1012.

52 (1927), 43 TLR 400.

The judge found that, under the rules, management of the club was "obviously intended to be maintained in the hands of the men's committee." It was "obvious" despite the fact that "the rules were not quite so clear as they might have been made with a little more care in the drafting." But perhaps that is nitpicking.

The case arose when The Committee voted to disband the women's committee which apparently existed at the pleasure of the men. The women, not altogether surprisingly, took exception. But there was more at stake. The women's lawyer drew a connection between club membership and social status. He argued the women should have a say in the running of the club because their reputations were at stake. They could, he said, be expelled and "socially ruined" without any say in the matter. There is perhaps more to the attraction of golf club membership than avoiding slow play and bad etiquette on public courses. Could it be exclusiveness for its own sake? Not among golfers, surely.[53]

Internicine Warfare

There was yet another aspect to the *Cole* case. The men were moved to exercise their absolute power apparently because a nasty dispute had arisen among the women members. The women who brought the suit in protest against the action of the men's committee were the putative women's captain and secretary. They had declared themselves elected to those posts when theirs were the only names put forward, a contender's name having been rejected on a technicality they had raised. Their attempts to exercise the authority of the offices to which they laid claim were met with objection from other women. The men, aghast at the unseemly squabble which they saw as bringing the club into disrepute and ridicule, thought abolition of the women's committee the best way to restore decorum.

Thus, golf clubs, like any group of people connected by common purpose, are caught from time to time in the throes of politics. Differences large and small, slights real and imagined, can erupt into confrontations which, in their ferocity, challenge the most heated exchanges in any parliament. Sometimes these squabbles can only be resolved in the courts. *Miller* v *Smith*[54] is such a case. Mrs Miller was a member of the Queen's Park Ladies Golf Club in Invercargill. She was suspended from the club for unspecified "conduct on the course contrary to the ethics of club membership." She went to court to have the suspension overturned. In the judgment there is reference to a simmering dispute among some of the members. The statement of claim, said the judge, contained "allegations of bias and malice of a sensational nature." But the claim for damages relating to those allegations was withdrawn during the trial and the judge was given no details to record for posterity. As to the suspension, the court said it

[53] In Australia, the Sex Discrimination Act 1984 (Cth) makes it unlawful for even a private club to limit access to its facilities on gender grounds, except where it is not practicable to do so and as long as access is allocated in "fair and reasonable proportions." The Keperra Country Golf Club in Queensland had a Saturday rule allowing bookings for groups of four on a first come first served basis. However, only two, that's right, two, times were available to women seeking to book. The tribunal found itself unpersuaded that this was a fair and reasonable proportion. *Corry* v *Keperra Country Golf Club* (1985), 64 ALR 556. But see *Quon* v *Club du Golf Richelieu Valley* (1994), 21 CHRR D/55.

[54] [1953] NZLR 1049.

could not stand since no rule of the club sanctioning it could be found. Indeed, if the club ever had a written constitution or set of rules, it had been lost or destroyed. Membership entailed rights, said the judge. These were more than an interest in the club's property; they included the right to play. The club argued that she could still play. She was only suspended from competitions. She could play on the links "alone or with a partner, if fortunate enough to find one," even on match day. Not good enough, said the judge. Her rights include playing in matches. And she was restored.

Professional Liability

Professional golf is a life to which many aspire. These days amateur glory seems just a stepping stone to the ultimate; the riches and fame of the American or European tour. Sometimes golfers are so determined they are prepared to sue to help them get there.[55] But there can be a downside. Like anyone in the business of making money, professional golfers can themselves be sued.[56]

And for some a place in professional golf is not a prize at all. In the late 1920s and early 1930s, a celebrated case, *Tolley* v *Fry*,[57] wended its way through the courts of England. It involved a leading amateur of the time, Cyril Tolley. Remember this was the time of Bobby Jones, the most celebrated amateur of all, who took on the professionals in the major championships and beat them all.

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[55] Recall the story of Lorie Kane recorded above. See note 27 and related text. See also *Deeson* v *PGA* (1966), 358 F. 2d 165. Herbert Deesen's complaint was that there should be no rules restricting entry on to the PGA tour. He invoked the US anti-monopoly laws, saying the restrictions on entry to tournaments unfairly limited competition in the business of playing professional tournament golf. The US Court of Appeals for the Ninth Circuit said the PGA rules were reasonable. Tournaments could only accommodate 150 to 160 players and some method was necessary to prevent them from getting bogged down with too many players. The differentiation that was made between PGA members and others was not for the purpose of suppressing competition. Herbert lost his case and his dream.

[56] See e.g. *Down (Inspector of Taxes)* v *Compston* [1937]2 All ER 475. Compston was a professional in England in the late 1930s. He was doing what countless pros had done before and have done since. He was supplementing his income by taking a few pounds from bets on private matches with club members and probably any one else who would take him on. Somehow this came to the attention of a Mr. Down, an Inspector of Taxes. It is not clear how. Perhaps Down had been fleeced himself. In any case he tried to impose income tax on Compston's winnings arguing they were "earned in the course of his vocation." They were, said Down, of the same character as tips received by a waiter or Easter offerings paid to a clergyman by his congregation. The court had trouble understanding the analogy and held that winnings on a golf wager were not gratuities related to the rendering of services as a professional and that the gambling was not so organised as to amount to the business of betting.
No doubt this reasoning would have won the approval of the first ever professional, Allan Robertson. It is said of him that:

> He was known to coddle the amateurs, barely besting them 2 up and 1 to play, in order to restrain the odds for their next meeting.
> G. Astor, above, note 34, p.10.

[57] [1931] AC 333 (HL).

The "Grand Slam" of golf was made up of two amateur championships, the British and the US, as well as the British and US Opens. Only an amateur could win all four, as Bobby Jones did in 1930. It was a time when club professionals were no more than highly skilled servants, not allowed in the clubhouse except once or twice a year by special invitation. Great amateurs were the most revered figures in golf. Professionals, while admired for their skill, were not what the game was really about.

Cyril Tolley was at the top level of the amateur game and known for his big hitting. He won the British Amateur in 1920 and 1929, the English Amateur in 1920 and 1928, and the French Open, which at that time attracted some of the world's best professionals like Walter Hagen, in 1924 and 1928. He played in the Walker Cup six times and was to become captain of the Royal and Ancient in 1948. In 1930 he almost denied Bobby Jones his Grand Slam. In the fourth round of the British Amateur at St. Andrews, Jones and Tolley fought out one of the great matches. Each had held the lead three times and the match was even after eighteen holes. Jones won it on the first extra hole.

In other words, Tolley was a great player and he was well known as a result; as well known in his day among people with even a passing interest in golf as Tiger Woods, Greg Norman or Nick Faldo are today. And, as would be true today, this "recognition factor" was much valued by advertisers of products. Certainly J.S. Fry and Sons Ltd., chocolate manufacturers, thought so. The "creative people" at their advertising agency devised an ad depicting a caricature of Tolley playing golf with a bar of their chocolate sticking out of his pocket. A grinning caddie, holding some of the chocolate, watched his shot in admiration. The caption read:

> The caddy (sic) to Tolley said, "Oh, Sir!
> Good shot, sir, that ball see it go, Sir!
> My word how it flies,
> Like a cartet of Fry's,
> They're handy, they're good and priced low, Sir!"

The advertisement appeared in the Daily Sketch on June 20, 1928 and in the Daily Mail two days later. The problem was they hadn't told Tolley about it, let alone asked his permission. He was not amused. So unamused was he that he commenced defamation proceedings. His statement of claim asserted that the ad conveyed the impression that he had permitted the use of his likeness, that he was seeking notoriety and gain, and that he had "prostituted his reputation as an amateur player for advertising purposes."

However it strikes us today, it was clearly a serious matter to Tolley. And it was clearly a matter of honour not money. Before things got to the trial stage his solicitors sent an offer of settlement to the defendants' solicitors in these terms:

> That if your client will publish, in the same newspapers as the advertisements complained of appeared, a statement that such advertisement was inserted without Mr. Tolley's knowledge or assent, and that he, Mr. Tolley, received no payment

> directly or indirectly for the use of his name, our client will then be prepared to agree to an order staying proceedings, the defendants paying... costs to date.

The other side agreed to publish the fact that no payment had been made but made no mention of the request for a statement that Tolley's approval had not been sought. As one judge remarked, this omission "lends strong colour to the suggestion that the publication in itself suggested assent and that the defendants were not particularly willing to let the world know that such assent had not been obtained."

Settlement not having been achieved, the case went to trial. Tolley's lawyer called two witnesses. One was a fellow international amateur golfer named Storey who testified that this advertisement would make many think that Tolley was not maintaining his amateur status. Mr. Hobson, who had been secretary of two "leading clubs", said that an amateur who lent his name to an advertisement would probably be "called upon to resign from any reputable club."

The main issue in a case like this is whether the publication of the material to which objection is taken is defamatory of the person it refers to. The test is whether it would tend to bring that person into disrepute in the minds of ordinary, sensible people. First the judge has to decide whether the material is *capable* of bearing a meaning which could have that effect. If the judge is satisfied on that account, the question is then put to the jury, did the publication *in fact* have that effect?

The trial judge thought the ad could be seen as defamatory. The jury thought it was and awarded Tolley 1000 pounds in damages. The chocolate makers appealed to the Court of Appeal. There two of the three Lords Justices said the trial judge was wrong to let the jury get its hands on the case. On the face of it, they said, the message contained in the ad was simply that he liked Fry's chocolate and possibly also that it helped him play good golf. It wasn't true, and Frys had "acted in a manner inconsistent with the decencies of life." But it was not clear that it would have made people think any less of him. And there were no special circumstances established by the evidence which would give a sting to otherwise non-defamatory words and pictures.

Only Lord Justice Scrutton held in Tolley's favour. Remember him? As plain Justice Scrutton he featured in the Mitcham Common case back in 1911. He railed then against "fancy inventions" and instructed at length on the need for caddies. He knew his golf then and he still had a certain feel for the game and its traditions in 1929. He began by setting the tone:

> Mr. Tolley was, as most people would be, much annoyed at this piece of offensive vulgarity, which reflects very little credit on the good taste of those who control the advertisements of Messrs Fry.

Quite so. But could reasonable people construe it as defamatory?

> I do not see why reasonable men should be expected to contemplate that Frys, a firm bearing an honoured name, were perpetrating this offensive vulgarity [in case you missed that before] of representing that a man who did not use their

> goods did use them, in order to sell their goods, and of doing so without ascertaining if the man in question objected.

While the words and pictures themselves, viewed in isolation, did not convey a defamatory meaning, the circumstances in which they were published gave rise to the inference, insulting to an amateur golfer, that Tolley had traded his fame for money. What is more, Frys knew the advertisement might compromise Tolley. Internal correspondence, disclosed at the trial, showed that they proposed to use other sporting luminaries in the same way. Two who were considered were prominent tennis players of the day, Helen Wills and Betty Nuthall. A letter to the company from the advertising agency said:

> Both Betty Nuthall and Helen Wills are amateurs, and in tennis circles, even more than in golf circles, the amateur status must be closely guarded, hence if Cyril Tolley has any quarrel with us, it is more than likely that both Helen Wills and Betty Nuthall would be upset at our caricaturing them for advertising purposes.

Unfortunately for Tolley, Lord Justice Scrutton was in a minority of one. But Tolley was not finished. He might have been down at the turn but he still had a few holes to play. He appealed to the House of Lords. And there, at last, he obtained satisfaction. Echoing the words of Lord Justice Scrutton, the House of Lords said:

> I am not satisfied that it would not be open to a jury, acting on their own knowledge as ordinary citizens, to assume that no reputable firm would have the effrontery and bad taste to take the name and reputation of a well-known man for an advertisement commending their goods without first obtaining his consent.

Their Lordships considered that the jury's damages award of 1000 pounds was excessive and ordered that that be put right, but Tolley had the victory he wanted. No doubt it was, for him, sweeter than any bar of chocolate could ever be. It is worth reflecting, though, that victory was a long time in coming. He first stared, appalled, at the offending advertisement in June, 1928. The House of Lords pronounced judgment on March 23, 1931. Could this have affected him? In the summer of 1930, for instance, might Tolley, free of the slur he felt he had suffered, have played better? Who knows. Perhaps he would have stopped Bobby Jones' quest for the Grand Slam, right there in the fourth round of the British Amateur. But he did not and the rest is, well, a darn good story. It would have been a shame had no one won the Grand Slam.

A Question of Value

In 1931 a fellow by the name of Woodward was a member of a golf club in Minnesota called simply "The Country Club." In October of that year he applied to renew his membership for three more years. He agreed to pay the annual dues of $85 plus tax. The club wrote him a letter accepting his application. But

then he failed to come up with the money. So the proprietors of the club sued him for it.

Was there a contract? As every law student could tell you, for a contract to exist and be enforceable there must have been an offer by one side which has been accepted by the other side. Here the man offered to rejoin the club on its terms including a promise to pay the dues. The club accepted that offer. But both sides had to be putting up something of value. There had to be consideration. In this case Woodward had promised to give something of value; $85. But, in *Thorpe Brothers* v *Woodward*,[58] a majority of the Supreme Court of Minnesota said there was no evidence that the club had promised to give anything in return.

Consider that for a moment. The privileges of membership – the right to play golf – not something of value? Not even up there with a box of Wheaties or a second-hand bicycle? Fortunately, reason and good sense are not lacking among most judges. In one way or another, the worth of what G.M. Kelly called a "prized relaxation" receives frequent affirmation from them.[59] When the executive of the Queen's Park Ladies Golf Club in New Zealand tried to bar a member from playing in club competitions, they argued that it wasn't such a big deal. After all she was still a member of the club. The judge in *Miller* v *Smith*[60] said a membership was more than just a share in club property. It included rights; like the right to play. Any diminution of playing rights reduced the value of the membership. Yes indeed. To play is to be enriched. To be denied the chance to play is to be impoverished. That judge knew his stuff.

Conclusion

What then can we take from these cases? They offer reassurance that in golf there remains professional relevance for the lawyer, the Accident Compensation Scheme notwithstanding. As we have seen, they affirm for us that the pleasure of golf is indeed something of value. But, more than any of that, they provide a kind of scripture. Whatever the particulars, golfing or legal, the stories in the cases seem often to contain a moral. But then we lawyer-golfers are prone to that. Possibly inspired by the constant reminders delivered by commentators on golf telecasts, we hold dear the notion that our game is all about honour, fair play, good manners, and comradeship. We like to say that our game is a reflection of life. Yes, we are given to the corny and the cliche, to garnishing our endeavours on the links with the flavour of philosophy. And we see, everywhere in golf, the lessons of life. How a player behaves on the course, a standard tenet has it, betrays his or her wider character. If you cheat at golf, you will likely deceive in life. If you can deal with adversity in golf, you can deal with it in life. And so on. Well, by the evidence of the law reports, all this must be true. As the world at

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58 (1934), 256 NW 729.

59 For example disputes over golf memberships in matrimonial cases are treated as solemnly as those involving any other assets. See e.g. *Alexander* v *Alexander* (1981), 14 ACWS (2d) 461 (Ont. Co.Ct.) and *Noble* v *Noble* (1984), 50 BCLR 341 (SC). In personal injury cases, non-pecuniary damages are routinely awarded on account of the plaintiff's inability, as a result of the injury, to play golf any more. See e.g. *MacKinnon* v *Cook* (1991), 118 NBR (2d) 81, affirmed (1992), 126 NBR (2d) 178 (CA).

60 Above, note 54.

large is peopled by characters deceitful and honest, and life in general is filled with fortune good and bad, with outrageous coincidence, and with plans gone awry (in other words, the stuff of litigation), so too is golf. You need only look at the cases. They are peopled with a cast of all types and feature plots that, like much of reality, are often strange or humorous beyond creative imagination.

Perhaps it is inevitable that golf and the law should be so inextricably linked. It is common to speak of law as one of the foundations of a civilized society. There are those who see golf in the same light. Andrew Carnegie once said that golf is "an indispensable adjunct of a high civilization."[61] And we are told that Mr. Carnegie rarely joked. Anyway, we know he was right.

Certainly judges, those most steeped in the law, seem to regard golf with the same reverence. Judgments in golf cases sparkle in a way that other cases rarely do. So often there is an obvious knowledge of and appreciation for the culture of the game. Although mostly unnecessary for the resolution of the disputes in hand, erudite descriptions of the finer points of slices, shanks, heavy rough, and the honourable and ancient history of the game fill the paragraphs of these judgments. Whether it is pertinent (in either sense) to ask why or not, it is apparent that many judges, like the lawyers from whose ranks they emerge by and large, love their golf.

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[61] G. Astor, above, note 34, at p.30. Compare this observation made by Arthur Balfour, one time Prime Minister of Britain:

> With a fine Sea View, and a clear course in front of him, the golfer should find no difficulty in dismissing all worries from his mind, and regarding golf, even if it be very indifferent golf, as the true and adequate end of man's existence.

W.M. Short (ed.) *The Mind of Arthur James Balfour* (G.H. Duran Co., New York, 1918) p.193.