Legal
When Golf Balls Go Astray

What's Your Legal Liability?
by David McKay

When "FORE!" is yelled on the golf course, golfers aren't the only ones who should flinch. Most experienced golfers react instinctively and take cover quickly because they know a golf ball can do a lot of physical damage.

The golf course owner should be just as concerned because the law on liability resulting from injuries caused by errant golf balls is not clear and the damage to the golf course owner could be financial and substantial. The owner's liability depends, however, on the circumstances of each case.

A lawsuit for injury to persons or property will be based in most cases on the common law of "negligence" or "nuisance" and the statutory law under the Occupiers' Liability Act. Negligence is omitting to do something which a reasonable and prudent person would have done in the same situation. Negligence occurs, for example, when the person hitting the golf ball should have refrained from hitting the ball. Nuisance in a golf course setting is a structural or design flaw which constitutes a continuing risk of injury to persons or property adjoining the golf course. Holes abutting residential properties and roadways are typical examples. The Occupiers' Liability statutes place an onus upon property owners to keep visitors reasonably free from harm.

Let's look at some negligence cases. The first is the common situation of the ball being either hooked or sliced by the defendant golfer onto an adjoining fairway and striking a fellow golfer. An Ontario case apportioned no blame to the defendant because the rules of golf permit a player to proceed if the fairway he is playing is clear and there is no other reason to foresee damage. The person struck on the adjoining fairway accepts the risk of being injured as incidental to the game of golf. The case also made clear that liability does apply in the classic case where a golfer drives his ball into the group immediately in front of him.

An Alberta case dealt with the role of yelling 'Fore!' A player, believing he could hit safely, pushed his ball right of a par 3 green, striking and injuring a golfer who had just left the green. Unfortunately when the victim heard the word 'Fore', he turned in the direction of the ball and suffered a direct hit. A golf pro was called as an expert witness and testified that it was the normal practice to duck and shield one’s head. The court reasoned, however, that all golfers will not react to the warning 'Fore' in the same way. Some will crouch, others will turn away and others may run. "To say that a person is negligent for failing to react in a certain way is preposterous when the person shouting 'Fore' should not have hit the ball in the first place."
In our next case, an experienced golfer is instructing a novice who is asked to take a practice swing while the teacher stands in front of her. Unfortunately, the rookie strikes a ball directly in the instructor's 'no fly zone'. The British Columbia court apportioned the blame 75% to the novice and 25% to the instructor who should have cautioned the rookie regarding taking practice swings in the vicinity of the ball.

In a recent Vancouver case, an injured golfer is taking legal aim at not only the golfer who hit him, but also the organizers who put on the tournament and the golf club itself. The action is yet to be determined but we can speculate on the concerns these defendants may be weighing. The ball striker's liability has been covered earlier. The tournament organizers may face allegations that they failed to properly control the event; they distributed uncontrolled amounts of alcohol or that they failed to properly warn participants, particularly novices, about the inherent dangers present on a golf course. In addition, the golf course owners could be accused of creating a hazardous situation in the course design, or failing to warn participants of potential risks.

What are the messages delivered by these cases? The first is applicable to any sport venue and that it is that player and spectators assume a certain risk inherent with either the games being played or the nature of the site, simply by entering upon the property. The next is that the driver of the golf ball will be the primary target of the personal injury lawyer. It is also quite possible that litigation defendants will include fellow players, golf course owners and tournament organizers and in some cases, individual course personnel.

If the case proceeds to trial, fault will be apportioned between the parties ranging from 0% to 100% to the driver of the ball, with various degrees of liability attributed to the other parties. The courts will consider the rules of golf and etiquette as relevant to apportioning liability. So don't discourage your players from shouting 'Fore!'

As golf course owner/managers of both public and private courses, the question is what did you fail to do which would be prudent and reasonable and would have limited liability. Here are some things you can do: First, carefully analyse all dangerous site situations within the boundaries of the golf course and take remedial action. Establish a "Plan." This is probably best embodied in a long-term tree planting program which addresses safety first and then aesthetics. Exposed tees and greens, parallel fairways and doglegs are obvious minefields. Doglegs for instance can be improved by trimming tree bottoms to create sight lines through the corners.

More improved prevention measures should be addressed by owners' associations and the insurers. The Rules of Golf could be examined and rewritten to focus in safety issues. If rules of etiquette were more clearly
explained and warnings included, the industry would be developing a more cautious golfer.

Is it too farfetched to offer safety equipment in pro shops to participants similar to the standards required by law to be worn by greenskeeping and other staff working on the course, particularly with respect to head injuries? Training sessions and manuals for starters and marshals could highlight dangerous situations on the golf course to communicate to players. For example, the normal instructions issued by starters to foursomes to keep up to the group in front should also include the caution: "but don't proceed until you can do so safely". Signage on the appropriate tees or set out in the power cart or scorecard could caution players with respect to the more dangerous situations on the course.

**Now what about your neighbours.**

The potential liability for a nuisance court action to the golf course owner may be pervasive and expensive and in the worst case scenario your golf operations could be effectively shut down. This is because one of the remedies available to a successful plaintiff neighbour is a permanent injunction. Golf courses increasingly find themselves surrounded by more intensive housing, busier roads, or ever-organized uses such as schools or camps. To take the position that the golf course pre-existed an adjoining use will not provide a liability umbrella that you might assume. The defence that the neighbour brought the nuisance upon himself has been universally rejected by the courts. Fundamentally, a land owner/user is entitled to the enjoyment of his property and this includes freedom from golf balls replicating surface to air to surface missiles.

An English case, from whence all golf lore emanates, involved a cricket pitch established in 1905. Seventy years later, an adjoining neighbour suffered five instances of damage in one season. Even though the Cricket Club had erected a 15-foot fence, the neighbour obtained an injunction. The most eminent jurist in the case, Lord Denning, did however state in dissent that an occasional stray ball did not constitute an unreasonable use of the cricket club's land or substantial interference in the neighbour's use of his land.

Various other defence arguments have not been of much comfort to the golf course owner. The neighbours do not have to take action to protect themselves. Over time a prescriptive easement might be recognized on vacant adjoining land so long as the neighbouring use does not change. On the positive side, there appears to be authority that the very occasional or slight interference on neighbouring property would not give rise to the severe remedy of an injunction.

This commentary is not intended to cause instant panic among golf course owners because there are over 2,000 courses in Canada and in any given hour or day there must be several hundred golf balls that go astray. The overall
damage that is reported is relatively slight.

But you should be proactive. Analyse dangerous situations and make improvements in design and barriers. Establish a policy of communicating with neighbours regarding compensation for damage. Caution your golfers. Document all incidences of damage. Consult with your insurance carrier.

One further caution: The writer is not a torts specialist. Consult your own legal eagle who might well want to recommend a personal injury lawyer if an errant ball commits the ultimate sin.