The risk of errant golf balls causing property damage or injury is always a concern for golf club owners and operators. A club cannot afford to ignore the risk of liability caused by errant golf balls. Taking proactive steps to mitigate the risk of damage caused by errant golf balls is an important first step in the overall risk management strategy for a club.

LIMIT YOUR LIABILITY
Cases from across Canada where our courts have had to deal with the issue of errant golf balls provide us with guidance on what the law requires of golf course owners. A recurring principle in Canadian judgments is that a golf course must use its property so as not to cause damage or injury to its neighbour; otherwise, liability may arise.

In some cases, our courts have recognized that there are certain inconveniences that are part of living adjacent to a golf course. However, at some point, the inconvenience of errant golf balls rises to the level of a legal wrong (known as a private nuisance) and the golf course is found liable.

When a golf course is found liable, the courts have done everything from order damages against the club, to issue an injunction, therefore restricting the operation of the club. The latter is a drastic measure, but is within the court’s arsenal if the golf club has not been proactive in managing the errant golf ball issue. So what exactly is nuisance and when does the inconvenience of an errant golf ball rise to the level of nuisance?

THE LAW OF NUISANCE
The basic principle of the law of nuisance is that homeowners have the right to use and enjoy their property without “unreasonable interference.” Hence, the club cannot use its property in such a way that it causes a nuisance and unreasonably interferes with a neighbour’s use of their own property.

The critical issue in nuisance cases is determining what constitutes an “unreasonable interference.” In other words, at what point do errant golf balls turn into an actionable wrong where the courts will impose liability on a club? The answer to this question turns on a number of factors, with the most important factor being the frequency and duration of the errant golf balls.

Mitigating Risks of Errant Golf Balls

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Generally, the case law has held that 10 to 20 errant balls per year cannot be considered a nuisance; however, approximately 200 errant balls a year or more can be considered a nuisance.

In a case from Saskatchewan, Lakeview Gardens Ltd. v. Regina (City), the plaintiff owned a greenhouse and garden centre, which had neighbouring adjacent to the golf course for over ten years. Over the span of ten years, the plaintiff had collected 10 to 20 golf balls per year, which had caused four glass breakages. The trial judge found that the golf course was creating a nuisance and imposed an injunction on the course. However, the Saskatchewan Court of Appeal found the trial judge erred.

According to the Court of Appeal, there was no evidence that the plaintiff’s business was in any way impaired, hindered or damaged. No one was struck by or otherwise injured by a golf ball or glass broken by a golf ball, and there was only one instance in the evidence of anyone having actually been injured by a golf ball or glass impaired, hindered or damaged. There was no evidence that the course had taken various measures to help prevent the problem including, erecting fences and different sized nets and re-directing the direction of some of the tee-off mats. It has also tried different types of range balls. The Alberta Court of Queen’s Bench found the golf course liable in nuisance based on the frequency and severity of the interference. According to the plaintiff’s records, 174 balls landed in the plaintiff’s yard in the first year, 88 in the second year, and 176 landed in the plaintiff’s yard in the third year. Even though the course had taken steps to mitigate the risk, damages in the amount of $2,500 were awarded to the homeowner.

These two cases demonstrate that the courts are looking not only at the duration, frequency and severity of the interference, but also at the risk of damage and injury, along with the steps that the course has taken to mitigate the risk of errant golf balls. Below is a useful summary of errant golf ball cases from across the country, demonstrating the circumstances under which a course has been found liable:

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Province</th>
<th>Duration of interference</th>
<th>Errant Balls Per Year</th>
<th>Award to homeowner</th>
<th>Nature of Claim</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carley v. Willow Park Golf Course Ltd.</td>
<td>Alberta</td>
<td>3 years</td>
<td>60 to 174</td>
<td>$2,500</td>
<td>Nuisance</td>
</tr>
<tr>
<td>Sagal v. Brightwood Golf &amp; Country Club Ltd.</td>
<td>Alberta</td>
<td>4 years</td>
<td>500</td>
<td>$1,000</td>
<td>Nuisance</td>
</tr>
<tr>
<td>Gibbings v. Lost Lagoon Golf Inc.</td>
<td>British Columbia</td>
<td>5 years</td>
<td>1,400</td>
<td>$3,000</td>
<td>Nuisance</td>
</tr>
<tr>
<td>Sarnat v. Highwood Golf Course Ltd.</td>
<td>Ontario</td>
<td>5 years</td>
<td>“infinite”</td>
<td>$15,000</td>
<td>Nuisance</td>
</tr>
<tr>
<td>Celkin v. Tulum Lakeside Ltd.</td>
<td>Saskatchewan</td>
<td>3 years</td>
<td>500 to 1,000</td>
<td>Nuisance</td>
<td>Nuisance</td>
</tr>
</tbody>
</table>

The recent decision on errant golf balls is from the Nova Scotia Provincial Court, Norton v. Brightwood Golf & Country Club Ltd., 2014 NSSM 75. In this refreshing decision, there was no liability assessed against the golf course for errant golf balls. The Court acknowledged that an indeterminate number of golf balls had entered the Claimant’s property and had caused damage, including one that struck the Claimant’s cat.

The evidence on the number of balls that entered the Claimant’s yard was inconsistent, but the range was anywhere from 121 to 312 balls per year. Despite the range of balls being potentially over 200 per year, the court held the course was not liable because the amount of balls entering her yard did not unreasonably interfere with her use and enjoyment. In deciding that the plaintiff had failed to discharge the onus of establishing an unreasonable interference, the court relied on evidence from the plaintiff’s neighbour that despite experiencing a similar or slightly higher volume of balls entering her yard than the plaintiff, she still enjoys the location and her yard.

The Norton decision is important because it demonstrates that even with errant golf balls in the range of 121 to 312, liability does not automatically attach to the course. The Norton decision is also important because the court made it clear that it did not matter whether the golf course was there before the property was built. If the activity inhibits the plaintiff’s use and enjoyment of the property, the golf course may be liable in nuisance. So what is a golf course to do?

There are several things a club owner can do to mitigate the risk created by errant golf balls. The most important thing to keep in mind is to be proactive and have a plan to deal with errant golf balls. If you let the problem of errant golf balls fester, it will end up costing you more in the long run.

COING AFTER THE “BAD GOLFER”

A question that club owners frequently ask is, “Can we go after the golfer?” My experience, going after the golfer is not always the most practical option. Not only are there sound business reasons for why a club would not pursue a patron, there is also the practical side of keeping track of errant shots, tracking down the specific golfer and then trying to force a homeowner to deal with the golfer and not the club. The issue will almost always end up resulting in litigation involving the club.

Some clubs have opted to have their clients sign waivers, purportedly absolving the club of any liability for errant shots. The success of such a defence not only relies on the strength of the waiver, but also on whether the club is going to bring legal action against its patrons to enforce the waiver.

It is important to remember that even if responsibility for the errant shot is presumably passed on to the golfer through a waiver or release, the club may still be exposed to liability. For example, if the club is aware of a problem tee or has not erected netting or planted trees, then the golf course may still be liable. It seems to be of little practical and legal value to chase after the “bad golfer.”
INSURANCE COVERAGE
For clubs that do not want to pass liability on to their patrons, there are a number of other options. One such option is insurance. Increasingly, insurers are offering clubs liability coverage for property damage caused by errant golf balls.

Of course, obtaining coverage for errant golf balls is a business decision, guided by the frequency and duration of the problem, but it can offer relief knowing that you have coverage for damage caused by errant golf balls. For example, the following notice is used by a golf course in Australia:

Members are reminded to report all instances of errant golf balls that may have left the golf course, whether you believe it has caused third party damage or not. It is very important that the Club records these for a couple reasons. Firstly, this enables the Club to monitor our safety obligation and secondly, it allows the Club to claim any third party damage under the appropriate insurance policy, which has nil excess. If we cannot identify the member who hit the errant ball that results in a claim being lodged, a claim must be made under a different policy which has a $500 excess payable by the Club, for every claim.

Putting your name forward will not result in any personal claim being made against you, but it will save the Club money.1

This notice is a very useful way of reminding club members of their duty to report errant golf balls and that doing so saves the club money in the long run.

OTHER MITIGATING FACTORS
The following are other steps that a club owner can take to minimize the risk of liability created by errant golf balls:

• Have a plan in place to deal with errant golf balls; all managers and employees should be aware of the plan;
• If there is a problem hole, seriously consider moving tee boxes and/or redesign the hole;
• Re-orient tee-off mats;
• Reduce tee height;
• Eliminate landscaping that causes blind spots;
• Plant protective trees between fairways and behind greens;
• Place nets in problem areas;
• Consider restrictions on the types of clubs used and/or use limited flight balls.

BALANCING ACT
While mitigation is not necessarily a defence, it does reduce the amount of damages that a court will award to the homeowner. The balance between a club’s ability to operate and provide a challenging course to its patrons and an adjacent homeowner’s ability to enjoy their property free from a barrage of errant golf balls can often be hard to strike, but the law requires that balance be found.

In March 2015, Bally Haly Country Club saved $822 by purchasing their scorecards through The Lowe-Martin Group, Golfmax supplier of the NGCOA Canada