"GOLFING AND THE *CIVIL LIABILITY ACT* 2003"

David Muir

1. Introduction

1.1 The issue of risk allocation in sport and other recreational activities has received much judicial attention.[1] At common law, the occupier of a sporting ground will generally owe a duty of care to all entrants, including players, spectators and assistants.[2] This duty of care may extend to taking precautions against personal injury.

2. *Civil Liability Act 2003* (Qld)

2.1 The *Civil Liability Act 2003* (Qld) ("the Act") effects substantive changes to the common law of tort and contract. The Act commenced on 9 April 2003 but contains retrospective provisions that relate to liability arising on or after 2 December 2002. The Act operates as an amendment to the *Personal Injuries Proceedings Act* 2002, and relates to any civil claim for damages for 'harm', regardless of whether the claim is brought in tort, contract or under statute.

3. Liability of Players

3.1 The popular sport and recreational activity of golf has been the subject of the recent decision, *Ollier v Magnetic Island Country Club Incorporated & Anor.*[3] That case examined the duties owed to players of the sport by fellow players and the golf club, as outlined later in this paper.

4. Negligence – Duty

4.1 <u>Pre – *Civil Liability Act:*</u>

(1) At common law, an occupier of a golfing facility owes a duty to spectators to take reasonable care to avoid acts or omissions which it can reasonably foresee would be likely to cause injury.[4]

(2) To satisfy the duty, the occupier must take reasonable steps to plan sporting events. An occupier must also exercise reasonable skill and care to ensure the premises in which the sport is held is safe. An occupier may be liable to 'non-golfers' where the occupier could have, but failed to, take measures to mitigate foreseeable risks.

4.2 <u>*Post – Civil Liability Act*</u>

(1) Schedule 2 of the Act defines 'duty' as –

---

[1] see *Woods v Multi-Sport Holdings Pty Ltd* 186 (2002) 145; *Agar v Hyde* (2000) 201 CLR 552; *Cleghorn v Oldham* (1927) 43 TLR 465
[2] *Albany Golf Club Inc v Carey* (1987) ATR 80-139*; White v Blackmoore* [1972] 2 QB 651*; Tonkin v Gunn* (1988) ATR 80-219
[3] [2003] QSC 263
[4] *Donoghue v Stevenson* [1932] AC 562

"a duty of care in tort; or a duty of care under a contract that is concurrent and coextensive with a duty of care in tort; or another duty under statute or otherwise that is concurrent with a duty of care in tort and contract."

(2) A 'duty of Care' is thus defined as 'a duty to take reasonable care or to exercise reasonable skill (or both duties)'. The Act therefore retains the common law position.

5. Negligence – Breach

5.1 Pre – *Civil Liability Act*

(1) At common law, an occupier of a golf course will be in breach of its duty of care, if the occupier foresees that its conduct involves a degree of risk of injury to the plaintiff. A risk that is not far-fetched or fanciful is real and therefore foreseeable, though a plaintiff is expected to take care of their own safety.[5]

(2) Being struck by a golf ball on a golf course has been found to be reasonably foreseeable.[6] Whether an occupier has actually breached its duty of care will depend on the circumstances of the particular case at hand.

(3) Generally, sporting rules will not have a determinative value, though they may have evidentiary value in establishing the appropriate *standard* of care.

(4) The standard of care will ordinarily be measured against the reasonable sports person with knowledge and expertise in the sport in which the breach occurred.[7]

5.2 Post – *Civil Liability Act*

(1) The Act establishes a two-tier test for determining whether a person has breached a duty of care by failing to take reasonable precautions against a risk of harm . Each limb must be satisfied as a pre-requisite to the finding of a breach.[8]

(2) Under the first limb, the risk of injury must be foreseeable – 'a risk which a person knew or ought reasonably to know'. Under the second limb, the risk must not be insignificant, and in the circumstances, a reasonable person in that position would take precautions to guard against the risk. Also the Act introduces a new factor to be taken into account in deciding whether there has been a breach, namely, the social utility of the activity that creates the risk of harm.

(3) The Act therefore restrains the common law principles, enshrined in *Wyong Shire Council v Shirt*[9], to the extent that the test for a risk "that is not far-fetched or fanciful" would fall outside the ambit of "significant" under the new test. The Act also clarifies certain issues relating to the taking of precautions.

6. Negligence – Damage

[5] *Wyong Shire Council v Shirt* (1980) 146 CLR 40
[6] *The Albany Golf Club Incorporated v John Richard Carey (1987) Aust Torts Reports ¶80-139*
[7] *Anderson v Mount Isa Basketball Association Incorporated* (1997) Australian Torts Reports 81-451
[8] section 9
[9] (1980) 146 CLR 40

6.1 Pre – *Civil Liability Act*

(1) At common law, damages are awarded to an injured plaintiff in order to place the Plaintiff in the same position he or she would have been in had he or she not sustained the injuries.[10] Aggravated and exemplary damages may be awarded for personal injuries cases at common law.

6.2 Post – *Civil Liability Act*

(1) The awarding of damages pursuant to the Act is only in relation to personal injuries[11]. The Act prescribes a formula to quantify general damages based on the injury scale value applied by the court.[12] Exemplary, punitive or aggravated damages can no longer be awarded, unless there is in unlawful intentional act done with intent to cause personal injury.[13]

7. Assumption of Risk & Contributory Negligence

7.1 Pre – *Civil Liability Act*

(1) Legislation throughout Australia provides for the apportionment of damages in cases of contributory negligence.[14] Contributory negligence may reduce an award for damages, though it is a partial and not a complete defence.

(2) A spectator struck by a golf ball may therefore be contributory negligent, if they have failed to act as a reasonable person in taking care for their own safety.

(3) An occupier of a golf course may argue that there has been no breach of duty, as spectators to the game have assumed the risk of being hit by a golf ball, or may argue that the risk is obvious such that the Plaintiff is required to take care of their own safety.

(4) In *Ollier v Magnetic Island* it was held that a player being struck by a golf ball was *not* a risk inherent in the game of golf, as 'the rules of the game expressly provide that steps be taken to avoid it'.

(5) In contrast, the decision in *Murray v Harringay Arena Ltd*[15] involved a spectator who was struck by a hockey puck during a hockey match. The court held that an occupier is not required to guard against every known risk. There was no indication that the occupiers of the premises had been negligent and "the injury sustained by [the Plaintiff] resulted from a danger incident to the game of which spectators took the risk."

(6) A Plaintiff who does not observe the rules of the game, or deliberately or recklessly places themselves in danger of being struck by a golf ball may create an 'obvious risk', and would not be entitled to recover damages.

7.2 Post – *Civil Liability Act*

---

[10] *Todorovic v Waller* (1981) 150 CLR 402
[11] Section 50
[12] Sections 61 and 62
[13] section 52
[14] *Law Reform Act* 1995 (Qld), section 10
[15] (1951) KB 529

(1) The Act changes the common law position with regard to contributory negligence. The Act allows a court to reduce a claim to zero if a court finds that it would be just and equitable to do so[16].

Inherent Risks

(2) In the case of golf players, it has been held being struck by a golf ball during a game, is not a risk inherent in a game of golf.[17]

(3) 'Inherent risks' are discussed in section 16 of the Act. Under that section a person is **not** liable in negligence for the harm suffered by another as a result of 'the materialisation of an inherent risk'. An 'Inherent risk' is defined as a 'risk of something occurring that can not be avoided by the exercise of reasonable care and skill'. Section 16 however, does not operate to exclude liability in connection with a duty to warn of a risk.

(4) While there is authority stating that the risks involved in golf are not 'inherent', the risk of players and spectators being struck by a golf ball may nevertheless be a risk that is 'obvious'.

Obvious Risks

(5) Section 13 of the Act defines an obvious risk:

1. *A risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.*

2. *Obvious risks include risks that are patent or a matter of common knowledge.*

3. *A risk of something occurring can be an obvious risk even though it has a low probability of occurring.*

4. *A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable*.

Presumption of Awareness

(6) Section 14 of the Act states that in an action for damages for breach of duty causing harm, where:

(a) the defence of voluntary assumption of risk (i.e. 'volenti non fit injuria') is raised by the defendant; and

(b) the risk in question is an obvious risk;

the plaintiff is taken to have been aware of the risk, despite not being aware of its precise nature, extent or manner of occurrence[18].

(7) The onus is then on the *plaintiff* to prove that he or she was not aware of the risk. Section 14 therefore reverses the onus of proof for proving the defence of voluntary assumption of risk. The defendant must merely raise the *volenti* defence, and the plaintiff is then required to prove, on the balance of probabilities, that he or she was not aware of the 'obvious' risk.

[16] Section 24
[17] *Ollier v Magnetic Island* [2003] QSC 263 at par 47
[18] Section 14

No proactive duty to warn of obvious risk

(8) Under the Act, a defendant does **not** owe a duty to a plaintiff to warn of obvious risks to the plaintiff.[19] This general rule however, will not apply if:

(a) the plaintiff has requested advice or information about the risk form the defendant;

(b) if the defendant is required by legislation to warn the plaintiff of the risk;

(c) or if the defendant is a professional,[20] and the risk is of death or personal injury from the provision of the professional services supplied by the defendant.

(9) The Act is therefore critical to the understanding of the risks involved in the game of golf.

(10) It arguable that the risk of being struck by a golf ball for players and spectators, while not an inherent risk, is still an 'obvious risk'. If this were the case, there is no duty on the occupiers/operators of the golf course to warn of an obvious risk, as a plaintiff will be presumed to know of the risk where the defence of volenti non fit injuria is raised.

(11) It should be noted that there remains scope for players and spectators who abide by the rules of the game to argue that the risk of being struck by a golf ball is not 'obvious' to a reasonable person.

(12) Players and spectators may argue that a reasonable person in their position who obeys the rules of the game is not subject to a 'patent' risk or a risk that is 'common knowledge'. While this point is arguable by players or spectators, the position of trespassers or other persons who wander onto golf courses uninvited, is quite different.

8. Trespassers

8.1 Pre – *Civil Liability Act*

(1) At common law, it has been held that there is no general principle that a person who suffers damage directly as a result of his or her own an unlawful conduct 'can never complain of a wrongful or negligent act or omission on the part of the defendant from which the damage otherwise flows as a reasonable and probable consequence'.[21]

(2) A trespasser may therefore claim damages for personal injuries.

8.2 Post – *Civil Liability Act*

(1) Under the Act, an occupier of a golf course will not incur civil liability if the plaintiff suffered harm while engaged in conduct that constitutes an indictable offence and the persons conduct contributed materially to the risk of the harm. The court retains the discretion to award damages in such circumstances if it is deemed harsh and unjust not to do so.[22] Trespass is a civil cause of action,

[19] Section 15
[20] Does not refer to a doctor. 'Professional' means a 'person practising a profession' (section 20)
[21] *Henwood v Municipal Tramways Trust* (1938) 60 CLR 438
[22] section 45

rather than a criminal offence, thus the provisions relating to illegality may have no application in such circumstances.

(2) However, a trespasser unto a golf course will be faced with the obvious risk of being struck by a golf ball. While the rules of golfing 'etiquette' are followed by spectators and players to protect persons from injury, a trespasser by their own conduct does not follow these rules. It is clearly an obvious risk that a trespasser or other uninvited person onto a golf course may be injured by a golf ball.

8.3 In these circumstances, the owner/operator of the golf course is not required to warn of the obvious risk. As the risk is 'obvious', when the defence of voluntary assumption of risk is raised, the plaintiff will be presumed to have been aware of the obvious risk. It will be difficult for a plaintiff to argue that they were not aware of a risk that is 'patent' or a matter of 'common knowledge'.

9. Dangerous Recreational Activities

9.1 The Act provides that there will be 'no liability' for personal injuries suffered from obvious risks of dangerous recreational activities. A 'Dangerous recreational activity' means an activity engaged in for enjoyment, relaxation or leisure that involves a significant degree of risk of physical harm to a person.[23]

9.2 On the reasoning applied in *Ollier v Magnetic Island,* it is unlikely that golf could be characterised as a 'dangerous recreational activity'. If this were correct, these provisions would not apply, and occupiers of golf courses would remain liable for personal injuries occasioned by a breach of duty of care.

9.3 The provisions relating to 'obvious' risks however, are favourable to occupiers/operators of golf courses, as the onus will be on a plaintiff to argue that they were not aware of the obvious risk of being struck injured by a golf ball.

10. Summary of affect of Legal Reform

10.1 The affect of the Act on the common law is to clarify and, in fact, restrict liability that might attach to occupiers of golf courses. The most significant liability changes relate to the effects of an 'obvious risk', the restriction of the test of what is "reasonably foreseeable", and in allowing reduction of a claim to zero for contributory negligence.

10.2 The provisions relating to obvious risks make it clear that recent judicial authority[24] to make no liability findings in the face of obvious risks will be entrenched in the Act.

10.3 Accordingly the Act has improved the liability position of golf clubs and will govern claims arising on or after 2 December 2002.

10.4 The *Ollier* case was a judgment under the previous law. In any event, the golf club was absolved of any liability in that case. The liability finding was against a player who failed to check that the fairway was clear before teeing off on the 8th hole of the course.

This article is intended to provide a general summary only and should not be relied on as a substitute for legal advice.

[23] Part 1, Division 4
[24] *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431