

# Golfer and Golf Club Found Liable to Player Struck in the Eye – Phee v Gordon + Another

Lord Brailsford today found both defenders liable in the case of Anthony Phee v James Gordon and Niddry Castle Golf Club, reported at <http://www.scotcourts.gov.uk/opinions/2011CSOH181.html>.

On the 10<sup>th</sup> August 2007, Mr Phee, the Pursuer, was playing a round of golf at Niddry Castle Golf Club. Passing from the 6<sup>th</sup> to the 7<sup>th</sup> holes, he was struck in the eye by a golf ball driven by Mr Gordon, the First Defender. Mr Gordon was driving off the 18<sup>th</sup> tee, some 150 yards away from Mr Phee. There were no warning signs on this path, despite its proximity to the 18<sup>th</sup> tee.

Mr Phee's position was around 12 degrees to the left of Mr Gordon's position. According to Mr Gordon, he realised immediately he had hit a bad shot, and shouted "fore".

Mr Phee heard the warning cry and ducked down, covering his head with one hand and looking up for the ball. In doing so, he was struck in the eye.

The case against Mr Gordon was that he failed in his common law duty of reasonable care not to cause harm to the Pursuer, both by playing his shot when it was unsafe to do so, and by not being quick enough to shout "fore". The case against the Golf Club was that it failed to fulfil its duty of reasonable care as laid down in the Occupiers Liability (Scotland) Act 1960, s2(1).

Lord Brailsford first had to determine if the defenders owed duties of care to the Pursuer. He followed the approach of Lord Bridge of Harwich in *Caparo Industries v Dickman* [1990] 2 AC 605:

"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other".

Lord Brailsford described the three stage test for determining if a duty of care arises:- "first, it must be determined if damage is reasonably foreseeable; second, it must be determined if there is sufficient proximity between the parties and, thirdly, it requires to be determined if it is fair, just and reasonable to impose the duty." His Lordship decided that these tests were satisfied for both defenders.

Counsel for Mr Gordon sought to argue that the shot was a "freak shot and a remote possibility which was foreseeable but not reasonably foreseeable". The Golf Club had accepted that "the shot struck by Mr Gordon which struck the pursuer was a bad or wayward shot but one which would on occasion be struck by every golfer."

Counsel for the First Defender also argued (and this was adopted too by the Second Defender) that it was necessary to have regard to "the sporting context and the relationship between the two players". This argument proceeded on the basis that there was a social value in the game of golf in Scotland and that such social value was a fact within judicial knowledge. The social value was that the game was played, on a regular

basis, by a very large number of people who derived pleasure from the game. Beyond that it required to be considered that there was an inherent relationship between players on a golf course who played the game within the context of a recognised set of rules and an acknowledged etiquette to the playing of the game. These rules and this etiquette recognised that the game was not risk free but were designed to ensure that risk was reduced to a level which would be acceptable, and importantly, recognised by those playing the game.

In addition, the Golf Club argued that there was an issue of causation in relation to whether or not the erection of warning signs, as desiderated by the Pursuer, would have prevented the accident. The Club argued it would not.

Both defenders sought to place a high degree of contributory negligence on Mr Phee, even though he was only playing his fifth round of golf in his life. They argued that he had not paid attention as he walked along the path in the direction of the 18<sup>th</sup> tee, and that he had not acted correctly when he heard the warning shout. Indeed, counsel for Mr Gordon sought to argue that the Pursuer was entirely to blame for the accident.

Lord Brailsford rejected that argument saying “I accept that a very experienced golfer might instinctively duck and cover his head. I do not consider that the same reaction could or should be expected of a person in the position of the pursuer. I do not consider that the pursuer, whatever he may have done, acted inappropriately.”

As far as Mr Gordon’s perception of risk went, he told the court he felt he was playing very well that day, and he was not concerned about the risk of hitting someone by driving off line. The court disagreed with that assessment saying “On the basis of his own evidence I consider that these errors were caused by an inflated degree of confidence occasioned by what Mr Gordon considered, wrongly in my view, to be the very good round of golf he was having.” As an aside, one wonders of His Lordship is a golfer – the feeling of playing better than one actually is, is well known to anyone who ventures on to the links.

The court considered that Mr Gordon ought to have had in his contemplation the fact that golfers do, from time to time, play bad shots; that it would not take much of a bad shot to place the Pursuer at risk, and that his own skills were not enough to eliminate such a possibility. Accordingly he owed Mr Phee a duty of care and indeed the primary responsibility for the accident lay on him.

As far as the Golf Club went, the court considered that it too owed a duty of care to the Pursuer and that this was breached by failure to erect signs. “There was evidence from all the golfers involved that they would have had regard to signs had they been in place. Both experts considered that signs would have been a proper and effective way to draw risk to the attention of golfers and, moreover, that such signs, had they existed, would have been likely to have been heeded.” As a result of this failure, and weighing the comparative blameworthiness of the parties, Lord Brailsford decided that Mr Gordon was 70% to blame, and the Club 30% liable.

As touched on above, he rejected the claim that any blame fell on the Pursuer, stating “There is, beyond even these time calculations, the consideration that the pursuer was a novice golfer with, at best, only a sketchy knowledge of how to react to warnings shouted on a golf course. I do not consider that a person in the position of the pursuer on the golf course that day should be judged too finely in any avoiding action he may, or may not, have taken. Quite simply, even if I were incorrect in my finding that he did duck, simply staring and trying to sight a ball would not in my view constitute negligent behaviour”.

Quantum having been agreed already, the case was put out By Order to discuss the precise terms of the decree.

## Conclusion

As the court observed, these cases often turn on their individual facts. But there are some wider lessons to be learned, I think.

I imagine that prudent Golf Club Secretaries across Scotland will be out checking their courses to see if there are any areas where warning signs might be placed. There might also be an addition to the scorecard telling players what to do if they hear a shout of “fore”. If, for example, the Second Defender here gave a clear warning that, on hearing such a cry, a player should not look up for the ball, might they have escaped liability, or had it reduced?

In addition, one would not be surprised if insurers of Golf Clubs sought to have some form of limitation or exclusion of liability incorporated into the “contract” for playing golf, though that raises further legal complications.

Prudent golfers too should be checking their home insurance policies to see whether or not they would be covered personally, in the event of a wayward drive having the same catastrophic effects as that of Mr Gordon on Mr Phee.