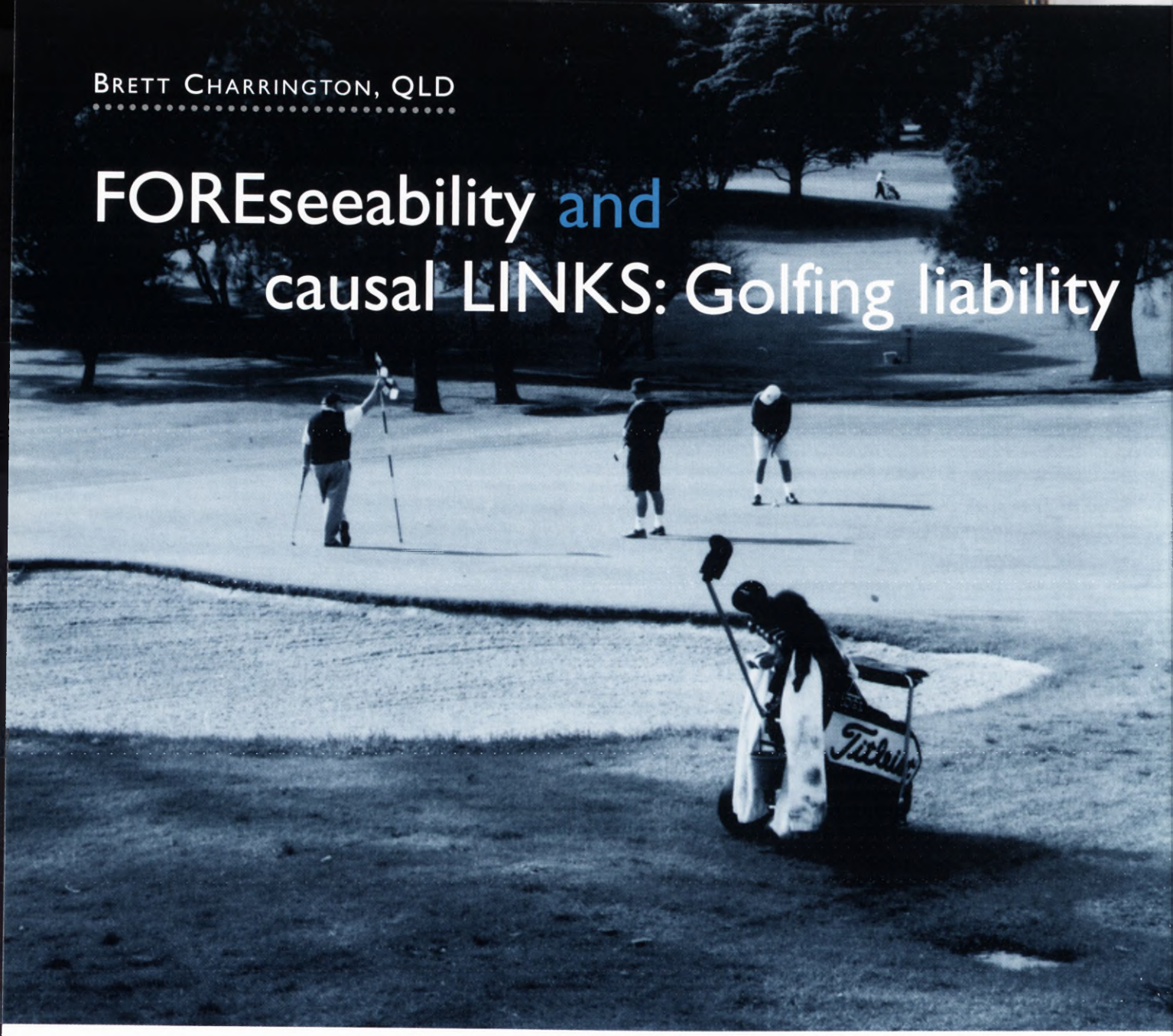
BRETT CHARRINGTON, QLD

FOREseeability and causal LINKS: Golfing liability



For most weekend hackers the main risk associated with golf is the wounded pride that follows a three-putt after hitting the green in regulation or shanking a shot onto an adjacent fairway. But for an unfortunate few, golf can provide much more serious hazards. This article examines the judicial consequences of such incidents.

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On 15 August 2003, the day this article's first draft was finished, Cullinane J delivered judgment in *Ollier v Magnetic Island Country Club Incorporated & Anor*[1]. This article shows the judgment is squarely within the principles established in previous cases and, indeed, the general principles of negligence. It is fair to say the reaction to this sensible decision has been hysterical.

This article will not consider recent legislative changes implementing the Ipp Report, due to the evolving nature of these reforms and the extensive differences between the emerging state regimes. Practitioners will need to turn their minds to the effect such legislative

changes may have on the precedential value of the decided cases.

GOLF COURSE DESIGN AND LAYOUT

The Albany Golf Club Incorporated v Carey[2]

The defendant golf club had been operating since around 1900. The tenth and eighteenth fairways ran north-south, parallel to each other, and were separated by a practice fairway, less than 200 metres in length.

Players on the practice fairway were limited to using low compression practice balls to limit the distance of their ball flight. The tenth green was situated in the line of ball flight from the tees on the practice fairway, but was largely hidden from view by a line of trees.

On the day in question the club was hosting its annual open championship, consisting of a field of 165 professionals and lowly handicapped amateurs.

Mr Carey and his playing partners reached the tenth green. He squatted behind his ball to line up his putt when a golf ball struck his right eye. Before the accident, Mr Carey and his playing partners noticed several practice balls on and around the green.

Crucial to the decision in *Carey* was the inferred finding of fact that the ball which hit the plaintiff came from the practice fairway, not another competitor on the course.

Mr Carey brought an action against the golf club, alleging that the position of the tenth green in relation to the practice fairway was dangerous and posed a foreseeable risk of injury. The judge at first instance agreed.

The club appealed various grounds, three of which are of general application. First, that the judge had failed to take into account Mr Carey's prior knowledge of the presence of the practice balls and the layout of the course. It was argued this should have led to a finding of voluntary assumption of risk.

Second, the plaintiff's knowledge of the risk and its inherent nature modified the defendant's duty such that no duty was owed in respect of the risk concerned.

Third, the test in *Wyong Shire Council v Shirt*[3] had been wrongly applied in that the risk involved was outweighed by the difficulty of taking alleviating action, especially having regard to the absence of a prior incident such as befell Mr Carey.

The Full Court of the Supreme Court of Western Australia, per Wallace J held:

'I find that there was on the day in question a foreseeable risk that a ball struck from the practice tee would strike, and thereby physically injure, players using the tenth green, and that that in fact happened. I further find that reasonable alternatives were available, in particular that the tenth hole be resited to the north and west or alternatively ▶

that use of the practice tee be restricted to certain clubs or whilst play was not in progress on the tenth green. The defendant club was therefore in breach of its duty of care to the plaintiff in permitting players to use the practice tee at the time and in the way they did.'

It should be noted that a golf course consultant's evidence at trial established that the design of the practice fairway did not conform to modern standards because it was too close to the tenth fairway and green. The consultant recommended relocating the green 20 metres to the west and 40 to 50 metres to the north, at a cost of $3000.

An architect to the Sou Australian Golf Associati described the practice fairwa width as barely adequate, an the layout as the 'minimun acceptable level'.

Buttita v Strathfield Municipal Council[4]

Mr Buttita was playing the teenth hole of a public golf cou ated by the defendant counc rained heavily the night before and the ground was wet. His approach shot to the sixteenth green went through the green and down a 'moderately steep' slope. He slid and fell while walking down the slope toward his ball, breaking his ankle in the process.

Mr Buttita failed at first instance before Garling DCJ. On appeal, Giles JA, with whom Spigelman CJ and Fitzgerald AJA agreed, held that 'golf courses are not nurseries'.

'They have grass, dirt slopes, and because golfers brave the weather the grass, dirt and slopes may be slippery during and after rain. Reasonable care to make a course safe for the purpose of playing golf does not require that every slope which may be slippery either is not initially constructed, or is reconfigured, or is barricaded or signposted. It is obvious to golfers as an ordinary incident of their golfing life that a slope such as that on the back of the sixteenth green, even on the appellant's case not dangerous when dry, may be slippery during and after rain.'

Giles JA further noted that Mr Buttita could have walked to the side and approached his ball by going around the edge of the green instead of down the slope. He also noted that there had been over 50,000 rounds of golf played at the course without any such incident being reported.

MATCH PLAY – LITIGATION AGAINST OTHER PLAYERS

Woods v Roberts[5]

Mr Woods and a friend, Mr Fulton, reached the par five dog-leg fourth hole at the Flagstaff Hill Golf Club in Adelaide. Mr Roberts and his girlfriend, Ms McKinney, who was acting as his caddy, were behind them.

Mr Woods had driven his ball about 200 metres into the middle of the fairway. When he reached his ball he stopped and turned to see what Mr Fulton was doing. He saw that Mr Fulton could not find his ball. Mr Woods started walking back to help him. His evidence at trial was that he was 30 metres from Mr Fulton and still on the fairway when he was hit by a golf ball.

It was not disputed that Mr Roberts had hit the ball in question. What was in dispute was Mr Woods' location when he was hit. Mr Roberts and Ms McKinney placed Mr Woods off the fairway, between the mounds on the left side. It was conceded that if Mr Woods was in that position, he would not have been visible to Mr Roberts.

To complicate matters, Mr Fulton died before the trial. Ultimately, the trial judge accepted Mr Roberts' account. This was partly due to a prior inconsistent statement given to a loss adjustor and signed by Mr Woods in the presence of a witness. In this statement he admitted seeing Mr Fulton call Mr Roberts through, something he denied at trial.

The principle defence Mr Roberts advanced was that Mr Fulton had 'called' him through by raising his club in the air in accordance with the rules and etiquette of golf. Mr Roberts took this as a sign that both players were safely out of harm's way and keeping a lookout for Mr Roberts' drive.

The issue for determination was 'whether the defendant, knowing there were two players ahead of him and not having followed them by sight as they walked from the fourth tee and seeing one signalling player closer to him and a buggy further on, was obliged to wait further before hitting so that he could be satisfied that the unseen player, wherever he may be, was safely out of harms way'.

The trial judge held that Mr Roberts, having been called through by Mr Fulton, was entitled to infer that Mr Fulton had warned his partner and that both were in a safe position to allow him to hit his drive.

The Full Court of the Supreme Court of South Australia, per Bleby J held:

'In the absence of being called through by Mr Fulton, there is no doubt that the respondent had a duty to ensure that the course ahead of him and within his striking range was clear of people who might be injured by his golf ball.'

However, the court held that the finding of fact that Mr Fulton had waved Mr Roberts through allowed him to assume both players ahead were keep-

ing an adequate lookout and did not require him to make further inquiries as to the location of the signaller's playing partner.

Both parties had accepted at trial that a signal by one player was on behalf of his or her group and the court felt that to hold otherwise would render the convention of playing through 'quite impracticable'.

Accordingly, the plaintiff's appeal was dismissed.

Crawford v Bonney[6]

Mr Crawford, a 35-year-old golfer of considerable experience, was playing a social round with his 14-year-old nephew, Mr Bonney.

Mr Bonney had caddied for Mr Crawford before and had played 10 to 12 rounds with Mr Crawford prior to the fateful day.

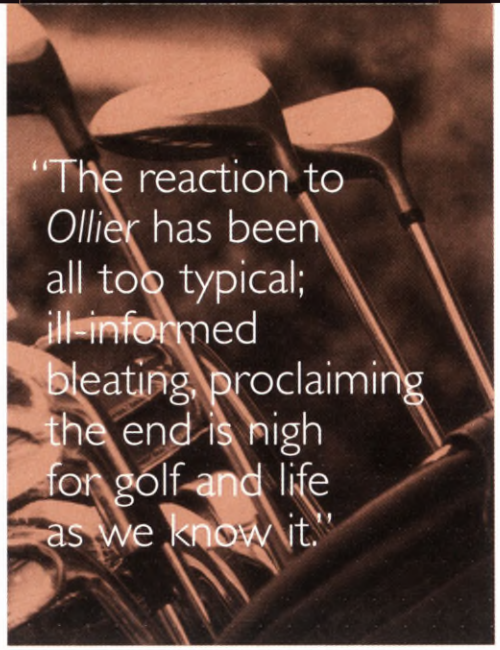
The incident occurred on the first fairway. Mr Crawford drove his tee shot about 180 to 200 metres down the middle of the fairway. Mr Bonney's drive went into the rough on the right of the fairway, a distance of only 50 metres. His second shot went about 100 metres and finished in the rough on the other side of the fairway.

The two players set off down the fairway. Mr Crawford saw two white objects he thought were balls on the fairway. The first of these he knew to be his ball. The second, about 30 or 40 metres further on, he assumed was his nephew's.

Mr Crawford addressed the ball, hit his second shot and turned to look for his nephew. At this moment Mr Bonney, who had found his ball in the rough about 30 metres before Mr Crawford's ball, hit his third shot, which struck Mr Crawford in the left eye.

Mr Bonney, aged 19 at trial, acknowledged that he contemplated whether or not to hit the shot. He decided to do so because his uncle was at about a 45-degree angle and would be safe if the shot went straight at the pin.

One of the arguments advanced on the defendant's behalf was akin to that which succeeded in *Cook v Cook*[7], that is, the standard expected of a 'learner' was lower than that of a reasonably competent golfer, particularly given the ▶



relationship of the parties.

However, Wright J in the Supreme Court of Tasmania rejected this argument and distinguished complex tasks, such as operating a motor vehicle, from the simple exercise of checking to see if someone was in harm's way before hitting a golf ball.

In finding for the plaintiff Wright J held:

'On his own evidence he appreciated that there may be a risk that he would strike a player between his ball and the hole unless he took care with his shot. The risk could be eliminated by the simple expedient of asking the other player to stand aside or waiting until he had done so before striking the ball. In my opinion the defendant fell below the standard of care reasonably to be expected of him in the circumstances.'

Ollier v Magnetic Island Country Club Incorporated & Anor[8]

Mr Ollier was 45 years of age when he played in a charity golf day at the Magnetic Island nine-hole golf course on 28 August 1994.

He was in a group of four, in a four-ball best ball Ambrose competition. His team's tee shot on the eighth travelled a distance of about 180 metres from the tee and landed on the right-side edge of the fairway.

Mr Ollier hit third in the group. He addressed the ball and commenced his backswing. Suddenly, a ball hit by the second defendant, Mr Shanahan, struck the side of his head.

Cullinane J held that Mr Ollier's group must have been visible to Mr Shanahan's group and that they were, as the accident proved, within range of the tee. Mr Shanahan had hit his tee shot when it was not safe to do so.

Mr Shanahan conceded that the rules of golf and common sense dictated that players should not hit their shot while the group in front was still within range.

Mr Ollier sued the golf club and the offending player. His Honour's findings in respect of each defendant deserve careful consideration.

It should be noted that the club unsuccessfully contended that it owed no duty of care to Mr Ollier as a user of the course. Cullinane J not surprisingly rejected this, citing *Nagle v Rottnest Island Authority*[9] as establishing that those encouraging people to use a facility for recreational purposes attracted a duty of care towards subsequent users. The duty was not limited to the facility's static features, but extended to operational and organisational activities.

The claim against the club had essentially two grounds. First, the club failed to properly inform players about the risks involved in hitting a ball within range of other players. Second, the club failed to adequately supervise the players through adequate marshalling.

The first ground failed because Mr Shanahan conceded the point about the dangers of hitting the ball when players ahead were within range. His evidence was that he did not see the group ahead in circumstances in which he should have. Thus, the club's alleged breach had no causal connection with what occurred.

The second argument failed because expert evidence from golfing professionals ensure the free flow of play. His Honour observed that the only way to overcome the event that occurred was to station a marshal at every hole and that this was impractical.

Cullinane J held, consistent with *Woods* and *Crawford*, that Mr Shanahan was liable 'because of his defective lookout'. It had been argued on his behalf that what befell Mr Ollier was an inherent risk in the game of golf, in accordance with *Rootes v Shelton*[10], thus a voluntary assumption of risk. Cullinane J rejected this, noting that the risk concerned was precluded by the rules of golf, which provided steps to avoid it. It is very interesting to note that Cullinane J did not consider the cases so far examined in this article, yet his reasoning reached remarkably similar conclusions.

WILDLIFE

Shorten v Grafton District Golf Club[11]

Mr Shorten was 13 years old at the time of his injury. He was playing the defendant's course with a young friend on 27 October 1996. They had played

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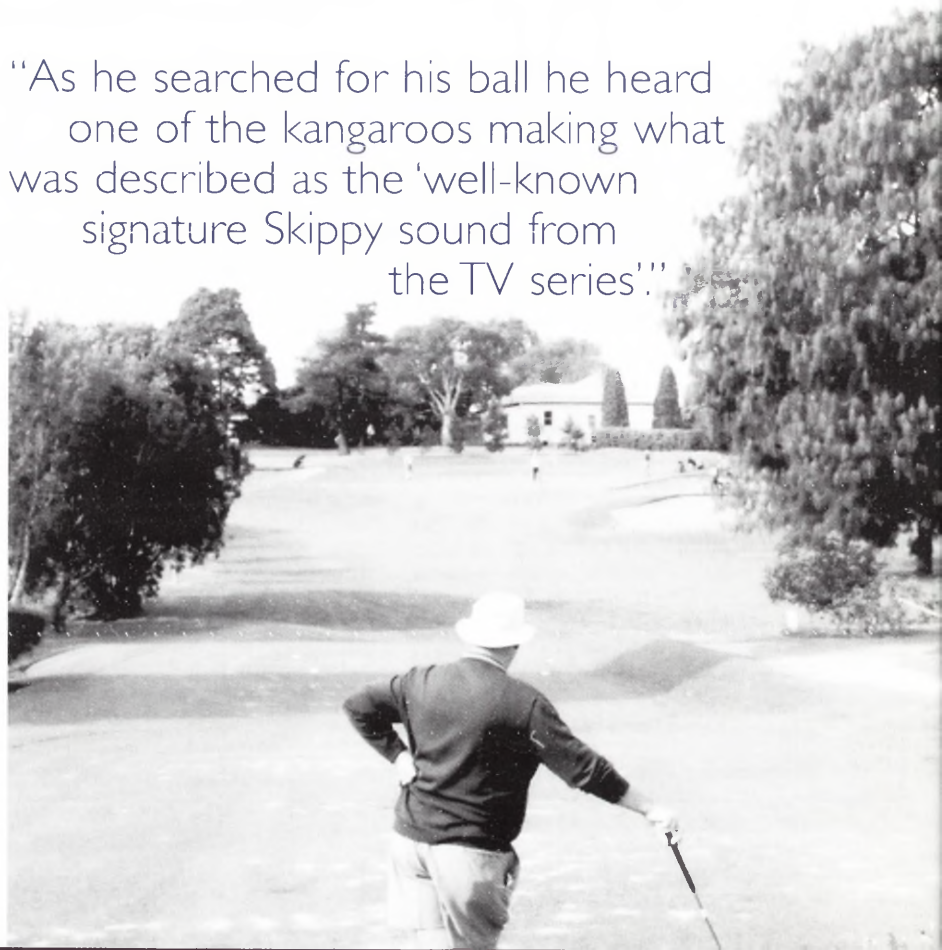

his older brother.

One of his shots went into some long rough near a mob of kangaroos which lived on the course. As he searched for his ball about 20 metres from the mob he heard one of the animal's making what was described as the 'well-known signature Skippy sound from the TV series'. He then heard a sound like a dog growling. A large male kangaroo subsequently chased, caught and attacked the plaintiff. Another golfer came to his aid and chased the animal away at the second attempt.

The evidence at trial was of four previous kangaroo attacks at the course. The defendant club had sought and received permission to cull individual kangaroos exhibiting aggressive behaviour.

The club had provided no warning or information to players about the risk of attack by kangaroos. It argued that such warnings, like the request for players to replace divots, would be ignored. In the New South Wales Court of Appeal, Fitzgerald JA dismissed this argument:

'It is obvious that warnings could have been easily notified and appropriately emphasised at virtually no cost or inconvenience to the respondent. Importantly, the respondent knew both of the risk to golfers and that most, if not all, golfers were unaware of the risk.'

CONCLUSION

Sadly, the reaction to *Ollier* has been all too typical; ill-informed bleating, proclaiming the end is nigh for golf and life as we know it. Professionals spoke about the risk of clubs closing and professionals leaving the ranks because of higher insurance premiums. Of course, they did not stop to consider that neither the club nor the local professional were found liable for Mr Ollier's horrific injuries, and thus, there would be no justification for insurers to increase golf club or professionals' premiums.

At common law, therefore, a golfer may be liable for his or her failure to take care for players within range of the next shot. Clubs will be liable where the design of the course is inherently flawed or they have failed to warn of known dangers.

It remains to be seen whether Ipp's 'obvious risk' provisions[12] have successfully protected insurers from claims by golfers. The judgment in *Ollier* gives hope to the contrary, so that the Mr Olliers of the world will continue to have the same right to compensation for injuries sustained as a result of a fellow golfer's lack of reasonable care on the course as they would if that person negligently collided with them on the road on the way home from golf. PL

Endnotes: **1** [2003] QSC 263. **2** Unreported, Full Court of the Supreme Court of Western Australia, 22 October 1987, BC8700697. **3** (1980) 146 CLR 40. **4** [2001] NSWCA 365. **5** Unreported, Full Court of the Supreme Court of South Australia, 5 December 1997, BC9706547. **6** Unreported, Supreme Court of Tasmania, 25 January 1995, BC9502972. **7** (1986) 162 CLR 376 at 382-84. **8** supra 1. **9** (1993) 177 CLR 423. **10** (1967) 196 CLR 383. **11** [2000] NSWCA 58. **12** s 13-16 *Civil Liability Act* 2003 (Qld).