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## Insurance Law E-alert

### Watch out Errol

The recent appeal decision *Pollard –v– Trude* clarifies the interpretation of an ‘obvious risk’ under ss 13 -15 of the *Civil Liability Act 2003 (Qld)* to occupiers of golf courses. The corresponding provisions, of the *Victorian Wrongs Act 1958* are ss. 53-54.

#### Background

While Dr Pollard was playing in a round in a club tournament 2004, he walked ahead of his group to retrieve his ball which had landed in trees off the fairway. Mr Trude, who was part of the same playing group, played a wayward shot which hit a tree and ricocheted into Dr Pollard who suffered a partial loss of vision in his right eye.

Dr Pollard commenced proceedings in the Supreme Court of Queensland. He alleged that Mr Trude was negligent by not giving a warning before taking his shot while he was in range. Dr Pollard also alleged that by calling “Watch out, Errol” or “Look out, Errol” instead of the traditional warning of “fore”, Mr Trude had failed to give an adequate warning when he realised he had mis-hit the ball.

The Supreme Court found that Mr Trude was not negligent when playing his shot while Dr Pollard was at the edge of the fairway. Chesterman J noted that although the rules of golf ordinarily prohibited shots while players were ahead and in range, in this instance the tournament rules had been modified to provide:

*“... Players should without delay, play all shots when they are ready and it is safe to do so irrespective of which player is furthest from the hole.”*

Furthermore, it was relevant that both players were proficient golfers. As such there was no expectation of danger when Mr Trude played his shot.

Mr Trude was also not negligent for failing to warn Dr Pollard before he took his shot. Chesterman J held that Dr Pollard had voluntarily moved ahead of play in order to find a lost ball and “expected [Mr Trude] to take that shot notwithstanding that he knew the plaintiff was in front of him”. Further finding that, by reference to s 15 of the *Civil Liability Act*, “to go in front of a golfer about to hit a shot is to run an “obvious risk” within the meaning of the Act and therefore, a prior warning was not necessary.

In relation to the warning concerning the mis-hit ball, Chesterman J held that using the phrase “Watch out, Errol” or “Look out, Errol” instead of the term “fore” was adequate as “either warning conveys the same message of impending danger from an approaching golf ball”. Dr Pollard appealed the decision.

#### Appeal

Dr Pollard submitted that the trial judge erred in his approach to deciding whether a pre-shot warning was required. The Court of Appeal noted that, in the absence of finding that it is common practice to give a warning, the most significant consideration in coming to the conclusion that a reasonable person would not have considered it necessary to give a warning in the circumstances was that Dr Pollard knew that Mr Trude was about to take his shot.

Issue was also taken with the Chesterman J’s conclusion that s 15 of the *Civil Liabilities Act* relieved Mr Trude of any duty to warn because the risk was an ‘obvious risk’. It was submitted that the trial judge had misidentified the risk as the risk of being struck by a golf ball when the “critical risk which was not obvious to Dr Pollard was that Mr Trude would take his shot without warning him that he was about to do so and would not call “Fore” if he mis-hit”. Holmes JA found the proposition illogical and held that “[t]he absence of a warning may increase the likelihood of the risk materialising, but it is not itself part of the risk of harm” – the relevant ‘risk’ is the ‘risk of harm’ and both Holmes JA and White AJA were content to accept this as an obvious risk.

It was also contended that the trial judge had erred in finding that “fore” was synonymous with “Watch out”. The Court of Appeal noted that while the trial judge was correct in his finding, the real question was whether Mr Trude’s duty of care obliged him to shout “fore” instead of “Watch out, Errol”. The Court of Appeal found that as there was only a general risk that the ball might be caught in the foliage and fall in Dr Pollard’s vicinity, “Watch out, Errol” was the response of a reasonable person to those circumstances.

The Court of Appeal unanimously dismissed Dr Pollard’s appeal.

#### What does this mean?

This is one of several recent cases where golfers have failed to win damages from other players after being struck by a stray ball. McMurdo P may have indicated that in his view the concept of “obvious risk” was narrower than that expressed by the majority. However, he still dismissed the appeal as the defendant had shouted a warning to the plaintiff as soon as it became apparent the ball was heading towards the plaintiff.

The case serves as an illustration of the difficulties faced in recovering damages for sporting injuries and highlights the importance to golfers that they warn others of their errant shots.

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