

## MAY 1986 LAW REVIEW

### GOLF COURSE LIABILITY FOR INJURY TO ADJACENT HOMEOWNER

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Last October, I had the opportunity to address the Delaware Recreation and Park Society at their annual awards banquet. At that time, I had a short conversation with NRPA Trustee Joseph O'Neill. O'Neill is the superintendent of recreation and special facilities for the New Castle County, Delaware Parks and Recreation Department. I was asked by O'Neill to include a case study in the law column which considered the duty of a golf course to adjacent property owners.

I referred this assignment to the students taking my recreational injury law course in the recreation department at the University of Maryland. As part of the course, students are taught the rudiments of legal research, specifically case finding. Using these case finding skills, students submit recreational injury court decisions to be included in a subsequent reading assignment for the entire class. Posed with the challenge to find a case which addressed O'Neill's concern, I was pleased to find that several students unearthed the *Nussbaum* case discussed herein. My own research on the topic had indicated that the *Nussbaum* decision was the best case on point.

#### GOLF BALLS KEEP FALLING ON MY HEAD

In the case of *Nussbaum v. Lapoco*, 27 N.Y.2d 311, 265 N.E.2d 762(1970), plaintiff Wilbur Nussbaum was injured when struck by defendant John Lapoco's errant golf shot. The facts of the case were as follows:

On June 30, 1963 defendant Lapoco, a trespasser on the golf course, struck a ball from the 13th tee. At that time the rough was dense and the trees were in full foliage. The shot, a high, bad one. "hooked" and crossed over into the area of Nussbaum's patio and there allegedly hit Nussbaum. Lapoco did not see Nussbaum and did not shout the traditional golfer's warning: "Fore!"

Nussbaum's home is situated so that it abuts the 13th hole of the defendant country club. Between Nussbaum's patio and the 13th fairway are approximately 20-to 30-feet of rough, and located in that golfer's no man's land is a natural barrier of 45-to 60-foot high trees. Although Nussbaum's real property line runs parallel to the 13th fairway, the direct and proper line of flight from the tee to the green was at a substantial angle to the right of the property line and the rough. It was thus, as any golfer would know, far to the right of Nussbaum's property line and patio, and it was not a "dog leg."

Nussbaum sued the country club for creating a nuisance and negligence in the design of the golf course. He sued Lapoco for negligence in failure to give a proper warning. The trial court dismissed Nussbaum's claim; the intermediate appellate court affirmed. Nussbaum then appealed to the state supreme court.

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As described by the state supreme court, “the property owner is liable only for risks inherent in the performance of an actor permitted to use the land and not for collateral or causal negligence on the part of the actor.” The court defined collateral negligence as “an abnormal departure from ordinary action and unusual misconduct which caused the alleged harm.” In this particular instance, Lapoco was not permitted to use the land. As a result, the court agreed with the lower courts that the defendant country club was not negligent under the circumstances of this case.

In his examination before trial, Lapoco, admittedly a trespasser, stated that he had been ejected more than once, and Nussbaum testified that other boys whom he saw were chased off the golf course. Thus, sufficient control over those who were permitted to play was exercised by the country club . . . There was no evidence that the [defendant country] club inadequately supervised its golf course or permitted immature and dangerous persons to play golf thereon.

The state supreme court also considered Nussbaum’s claim against the country club based upon nuisance. In the opinion of the court, “the design of the course was not such as to create a cause of action in nuisance or negligence.” According to the court, “nuisance imports a continuous invasion of rights and the occasional ‘once or twice’ a week errant golf ball that was found on Nussbaum’s property does not constitute sufficient impairment of plaintiff’s rights.”

There were only, according to Nussbaum and his wife, a few golf balls, which were found in the bushes and fence area of Nussbaum’s backyard. These minimal trespasses would not warrant granting of an injunction and cannot sustain a recovery for Nussbaum’s injuries . . . To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment especially uncomfortable or inconvenient. But every intrusion will not constitute a nuisance. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, and confusion incident to city life. So, too, one who deliberately decides to reside in the suburbs on very desirable lots adjoining golf clubs and thus receive social benefits and other not inconsiderable advantages of country club surroundings must accept the occasional, concomitant annoyances.

As described by the state supreme court, “three reasons impel the conclusion that no liability may be imposed within the concepts of negligence: lack of notice, assumption of risk and lack of foreseeability.”

That golf balls were found in the bushes and the fence area on Nussbaum’s property does not tend to establish any risk. These invasions are the annoyances which must be accepted by one who seeks to reside in the serenity and semi-isolation of such a pastoral setting. Thus, even if notice of these intrusions may be gleaned from the record, no preventive response was required. Remedial steps

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would be called for only if defendant [country club] had notice of a danger. Golf balls found in the areas adjacent to the rough—where, according to Nussbaum's evidence, they were discovered—would not have come over the trees. It was that potential occurrence which might constitute a danger, and no notice of such an incident was given. In fact, Nussbaum's wife testified that no golf ball ever struck her house. Certainly, if Lapoco's shot were not extraordinary and golf balls had travelled over the trees, Nussbaum's house would have been hit.

Under these circumstances, the state supreme court found that "the present accident is best described as unforeseeable." Since the possibility of an accident "could not be clear to the ordinarily prudent eye," the court concluded that "the accident was the result of cause for whose existence the club was not legally responsible."

Nussbaum's property and the fairway were separated by 20-to 30-feet of dense rough, through which no ball could pass with any great force, and a stand of trees 45-to 60-feet high, over which only one ball, so far as the evidence herein shows, has passed.

The state supreme court also rejected Nussbaum's contention that defendant Lapoco was negligent in failing "to give a timely warning" before taking his golf shot. According to the court, "such a warning is only required in favor of those who are in such a position that danger to them is reasonably anticipated." As a result, "there is no duty to shout 'fore' where the plaintiff is not in the line of play or on a contiguous hole or fairway."

That duty [to warn], which extends to other players did not extend to plaintiff Nussbaum. The duty is imposed to prevent accidents, and the relationship between the failure to warn and Nussbaum's injuries is tenuous at best. It rests on the improbable assumption that Nussbaum would have responded to it, even though no ball had ever struck his house. Living so close to a golf course, Nussbaum would necessarily hear numerous warning shouts each day. As the warning would ordinarily be directed to other golfers, Nussbaum would be expected to ignore them. We will not permit submission of this case to the jury on the remote possibility that Nussbaum could have recognized and acted upon any warning given by the golfer at this time.

The state supreme court, therefore, affirmed the order of the lower courts dismissing Nussbaum's claims.